No. 95-6510

(7)

Supreme Court, U.S.
FILED
FEB 15 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

COLEMAN WAYNE GRAY,

Petitioner,

vs.

J.D. NETHERLAND, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX
Volume II, Pages 180-376

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Petition For Certiorari Filed October 23, 1995
Certiorari Granted January 5, 1996

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200 pp

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[Caption Omitted In Printing]

* * *

[94] MICHAEL SLEZAK,

called as a witness by and on behalf of the Petitioner, having been first duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEE:

Q Good morning, detective. I'm Donald Lee and I represent the petitioner, Coleman Gray. Can you please state your name and address?

A My address?

THE COURT: You, don't have to give your address. Just what locale.

THE WITNESS: Michael R. Slezak. I live in Chesapeake, Virginia.

BY MR. LEE:

Q What do you do?

A I'm a police officer.

Q Where do you work?

A For the Chesapeake Police Department.

Q How long have you worked for the Chesapeake Police Department?

A Of and on, for 22 years. I have ten months broken service.

[95] Q What did you do during that ten months?

A I worked at Volvo of America Corporation and Norshipco.

Q So you weren't working in police work?

A Not during that time.

Q Before you went with the Chesapeake Police Department, were you involved in law enforcement?

A No.

Q What did you do then?

A I was in college for two years and prior to that I was in the Marine Corps.

Q Now, you testified in the penalty phase of Coleman Gray's capital murder trial; is that right?

A Yes, sir.

Q Can you describe for us the testimony that you gave?

MR. McLEES: Judge, I object. His testimony is in the record. His description of it is really, frankly, irrelevant.

THE COURT: Sustained. If you have some specific questions, go ahead.

BY MR. LEE:

Q Were you involved in the investigation of the murders of Lisa and Shanta Sorrell?

A Yes.

[96] Q Can you describe your role in that investigation?

A I was the chief investigator and was involved in the vast majority of the interviews and investigation.

Q How many other people in the Chesapeake Police Department were working with you on this case?

A Altogether, regardless of their amount of time that they were involved?

Q People who had substantial involvement.

A Probably five or six people had substantial involvement. The others may have been a one-day involvement or their activity was unfruitful.

Q Can you tell us who those five or six people are?

A Sergeant Harrison, then Detective Harrison; ID Officer Jack Dempsey, ID Officer Boyd Alsop; Lieutenant Ziegler, Detective Colin Riggs, and Detective Hartley.

Q Were these murders highly publicized?

A Yes.

Q Can you tell us a little bit about them and why they were highly publicized?

A Originally, the complaint came in of a missing person in the jurisdiction – or who had [97] jurisdiction in

the case was uncertain originally. The complainants who called to make missing person reports would call one department and they would be referred to another because the victim resided in one city, was last seen in another city, and supposed to go to a city in which they didn't reside. But throughout the evening, there were numerous calls made and finally, a missing person report was taken. That was on December 5th. And 5 days later, the vehicle was found with both victims in it.

Q And the victims were?

A Lisa and Shanta Sorrell.

Q Was any criticism leveled against the Chesapeake Police Department during the course of the investigation? You talked about this jurisdiction uncertainty.

A I'm sure there was. Someone criticizes everything.

Q Did that have something to do with the publicity that the case received?

A The criticism?

Q Yes.

A No, I think the criticism for the most part was the problem with getting the investigation or the reports initiated.

[98] Q Can you describe for the Court the early days of the investigation before you had developed any suspects?

A In what respect?

Q Well, what were you doing as lead investigator?

A The first –

MR. McLEES: Judge, excuse me, Your Honor. I would object. If he is going to ask him day by day what he did in the investigation, BRADY doesn't require an accounting of the investigation. It is unreasonable to expect it. It is irrelevant. It is a waste of time. If they think that the police withheld BRADY materials' let them ask that.

THE COURT: I tend to agree with you. Be more specific. We can't sit here all day as he recounts his entire investigation. I mean, I'll let you ask him what he did initially, but after that, let's get specific.

MR. LEE: Sure. I plan to get specific right away, Your Honor. I just want to get a little background for the Court.

BY MR. LEE:

Q During the early days of the investigation, before you developed any focused suspects, can you tell us what the major focus of your investigation [99] was, what you were trying to do and how you were trying to do it?

A Primarily it was collection of evidence and processing evidence that we had already collected. The car was – the victims – well, let me back up. The location where the vehicle was seen was processed as best we knew how at the time. The vehicle was then moved to police headquarters and both the vehicle and the victims – we were in the process of collecting evidence there. Subsequently, the vehicle was partially dismantled, and Sergeant Harrison and I transported parts of it to the

laboratory in Washington, to the FBI laboratory. I would say that the first three or four days, the majority of the time that we spent dealt with processing evidence.

Q After these first few days, did you eventually develop a suspect?

A Well, there was a suspect was developed that night.

Q Which night?

A The evening of the 10th when the bodies were found.

Q Who was that suspect?

A Timothy Sorrell.

[100] Q And how did you develop him as a suspect?

A I went to his – I think we were at his mother's house. We went to talk to him after the bodies had been positively identified. We had a conversation with him, and his statements caused myself and Sergeant Harrison to be suspicious of him.

Q Why did these statements make you suspicious?

A When we went into the house, it was late the evening of the 10th. As we came in we identified ourselves and this mother said, you don't have to tell them anything. Talking to her husband – I mean to her son and referring to us. We were taken by her statement. We asked Mr. Sorrell or told him that we were there to answer any questions that he might have. And we asked him if he had any questions, and he paused and his first question was whether or not we had a helicopter up

looking for the vehicle. I told him that we did not. He paused, then I asked him if he had other questions. He asked why he was – why we were so late in notifying him that his wife and child had been found. I told him that we were – we wanted to make certain that it was them, again, wait until we had a positive identification. With that, he said he had no other questions. And no [101] other conversations with him took place that night.

Q Was there anything else about that evening in your conversation with him that raised your suspicions?

A Not that evening, no. That was sufficient.

Q Did you develop further suspicions after that?

A Yes. There were general comments that he would make, his demeanor made us highly suspicious.

Q What about his demeanor?

A I don't know how to describe it other than to say that it was not what you would expect to find in a situation like that. He just seemed defensive.

Q Did you or anyone in your police department put Timothy Sorrell under surveillance?

A Yes.

Q Why did you do that?

A We were suspicious of him.

Q Can you describe that surveillance for us?

A I think that it occurred over a three-day period of time. The detective bureau, some uniformed officers, would keep his mother's house where he was staying

under surveillance by vehicle. The officers would be posted in several locations, and occasionally they would ride by the house to see, assure themselves that the vehicle was still there. [102] They would follow him if he left.

Q Did you learn anything – did the surveillance raise any further suspicions?

A Not that I recall.

Q Did Timothy Sorrell have an alibi for the time of these murders?

A Yes.

Q Can you tell us what that alibi was?

A He said that he was at a friend's house.

Q Did that alibi check out?

A According to the person with whom he was supposed to be visiting, she and her husband confirmed that he was there.

Q Did he ever tell you prior to that that he had been at the Chesapeake Technical School?

A I believe he did.

Q So that was his first alibi?

A Well, I don't know what order it came in or exactly how he said it, but we checked the records to see if – I believe it was his cousin that was supposed to be there, and not Mr. Sorrell himself. His statement, as I recall, was that he was at, I think it was Deborah Robertson's house. We checked. She lived in Norfolk and we checked with her and she said that he was there.

[103] Q So your recollection is that he never told you that he had been at Chesapeake Technical School from 7:30 until 10 o'clock that night.

A I don't recall him saying that he was there, I can't say that he didn't, but I don't recall that.

Q Did you ever establish a possible motive for Timothy Sorrell to have murdered his wife and his daughter?

A What do you mean by establish?

Q Did you ever learn any information that led you to believe that he may have had a motive?

A Yes. There was – we received an anonymous call that he had recently secured a life insurance policy for his wife. I believe it was in excess of $50,000. $50,000 or in excess of that.

Q How recently? How many days prior to her murder had he obtained that life insurance policy?

A I think it was within two weeks.

Q Did you follow up on that lead?

A He did in fact get the insurance.

Q Did you investigate any other possible motives, did any information come to light that led you to believe that he had other motives?

A We investigated everything that was brought up. There were any number of calls that people made. [104] Some of them we really didn't put any faith in when we received them, but someone would follow those up. I am not aware of any information that we received that we

didn't check into as far as suspects are concerned. Himself or someone else.

Q Can you tell us about some of the leads that you did put faith in? Do you remember receiving phone calls that led you to something substantial?

A Well, there was some people or several people who lived in the area where the car was found said that they saw some people walking down the road. Other people said that there was a small Chevette that was seen on the road. We investigated those, looked for – we were looking for people who had a Chevette with a red stripe on it. Every time somebody saw one they would give us the license number and we would check into those individuals to see if we could find out anything. There was nothing that we could find that was associated with the murders.

Q Did you investigate at some time that there may have been a possible drug connection, that that somehow played into the murders?

A We looked at that also, yes.

Q That was something you believed may have [105] involved Timothy Sorrell?

A Yes.

Q Was his brother arrested in connection with all of that at one time?

A Subsequently he was arrested, yes.

Q And did you question his brother when he was arrested?

A I'm not certain that I talked to him. I don't think that I talked to him concerning those charges after he was arrested. We didn't learn anything from that that would tend to incriminate Mr. Sorrell.

Q Was your goal to learn things, though –

A Timothy Sorrell, I should say.

Q Was your goal, though, in that arrest and in that interrogation to see if you could learn things that might help you in your investigation against Timothy Sorrell?

A Well, in the investigation in general, and Timothy Sorrell. We didn't work the case with the exclusive idea that he was the only possible suspect. He was the primary suspect at that time.

Q Who were the other suspects at that time?

A There weren't any by name.

Q Then what were they?

A The possibility is that someone else could have [106] done it. We didn't exclude that possibility. Whoever the unnamed or unknown individual in a Chevette was was a possible suspect. They were in the area, but we didn't know who they were. That sort of thing. Because we have a suspect, we don't eliminate any other possible information. I mean, we follow up what we have, whether we know a person's name or not.

Q Sure. But the only named suspect at the time was Timothy Sorrell? At that time?

A At that time, yes.

Q All right. Have you compiled an investigation file for the Sorrell case?

A Yes.

Q And have you reviewed that file to prepare for this hearing?

A Have I reviewed it?

Q Yes.

A Yes, I've reviewed it.

Q Is that the file, the investigation file in front of you?

A It is part of it.

Q What other parts of it exist, just generally? How much information do you have?

A How much information?

[107] Q Well, I read a Virginia Pilot article on 12-15-85 that said that you had four, three-inch thick binders, 14 cassette tapes and eight videotapes. Is that about what you have?

A The stack of paperwork would probably be 18 inches to two feet thick. There are videotapes. I can't tell you exactly how many there are.

Q Sure.

A Probably less than – I would say less than 6 videotapes and a large number of audiotapes.

MR. LEE: Could Detective Slezak please see the Petitioner's Exhibits?

(Documents proffered to witness.)

BY MR. LEE:

Q I'd like you to turn to what's listed as Petitioner's Exhibit 3 there, and it actually is comprised of several documents, A through G. Have you found those?

A I'm in three.

Q Okay. Those are Certificates of Analysis?

A Yes.

Q Could you take a quick look at all of them? Just the first page of each one is okay. Do that before I ask you the next question.

A Would you tell me what you want me to be looking [108] for?

Q Well, I'd like to know whether your investigation file contains these documents.

A All right.

(Witness perusing documents.)

A They appear to be copies that would be in the file. I can't comment on their authenticity, but they appear to be the ones.

Q We have had these documents certified by Dr. Fierro of the Bureau of Forensic Science and they have been admitted as exhibits. But I assume what you are saying is, this is the kind of information, one of the kinds of information your file should contain.

A Yes.

Q Okay. With respect to document 3-A, can you – this is a Certificate of Analysis dated January 17th, 1985 listing as victims Lisa, Sorrell and Shanta, Sorrell. below that it lists a suspect. Who is that?

A Timothy Sorrell.

Q The evidence was submitted by Detective Alsop. You mentioned his name earlier.

A Yes.

Q He submitted one blood-clotted tube from [109] suspect's perp. kit, item 40.

Do you know why Detective Alsop submitted that blood for analysis?

A Well, there was a large amount of blood in the vehicle. You have to determine where it originated from, whether it is the victim's, whether it is all the victims', or whether some of it is the suspect's. You have to determine its origin. There were any number of possibilities, more than one person had access to this car. And we didn't want to assume that because there was blood in the car, that it was the victims'. So we had to have the laboratory try to determine whose blood it was. And since Mr. Sorrell was at one time a driver of the car, we had his blood. I believe we also had hair samples taken from him.

Q Were you present when he submitted his perp. kit?

A When Mr. Sorrell did?

Q Right.

A I don't recall if I was standing there or not. I'm sure that I was nearby.

Q This is a toxicology report. I understand the need to run Timothy Sorrell's blood to see if it matched the blood in the car. Do you know why a [110] toxicology report was done?

A On him specifically?

Q Yes.

A We probably just asked them to do it.

Q For no particular reason?

A Well, if it came back positive, if it was positive for a particular drug, it would indicate that he was using some sort of drug. I'm assuming now that we were checking to see if he had some type of drug. But I don't specifically recall doing that. I'm sure that that's what it is.

Q To save the Court's time, I'll flip through these exhibits and note that Exhibit B is a Certificate of Analysis dated January 29th, 1985, again listing Timothy Sorrell as the suspect. And Exhibit 3-C is a Certificate of Analysis dated February 12th, 1985, again listing Timothy Sorrell as the suspect. And other forensic evidence was submitted in connection with that certificate and with that analysis.

Exhibit D is a Certificate of Analysis dated February 14th, 1985, again listing Timothy Sorrell as the suspect. Again E is a Certificate of Analysis dated March 14th, 1985, and it still lists Timothy Sorrell as the suspect. Exhibit F, Certificate of [111] Analysis dated March 20th,

1985 listing Timothy Sorrell as the suspect. And finally, Exhibit G, 3-G, a Certificate of Analysis dated July 30th, 1985, and this Certificate of Analysis still lists Timothy Sorrell as the suspect.

Do you know whether by July 30th,1985, Coleman Gray had been developed as a suspect in the Sorrell murders?

A I would say that he had, yes.

Q Why isn't his name listed here along with Timothy Sorrell's name on this Certificate of Analysis as a suspect?

A Well, I would have to comment on speculation. I can't tell you for sure. I could speculate.

Q Well, is it speculation based on your investigation and what you know from that time?

A Well, you are asking me to comment on someone else's thoughts who typed up this sheet.

Q I won't ask you to do that then. Do you know whether your file contains any Certificates of Analysis listing Coleman Gray as a suspect in the Sorrell murders?

A I'm not certain.

Q Okay. Did you ever – do you know whether Timothy Sorrell owned a gun; was that something that [112] you learned or didn't learn during the investigation?

A I don't know if he did or not.

Q Does your file contain anything concerning a statement made to the Chesapeake Police Department by

a female resident of Portsmouth that Timothy Sorrell arrived at her house on the night his wife and child disappeared and said that Sorrell told her that they were dead?

A If you tell me who the person is, I may know.

Q Well, I don't know the identity of the person, but if you co–

MR. LEE: Could we have the Respondent's book of exhibits given to Detective Slezak, please?

(Documents proffered to witness.)

BY MR. LEE:

Q Let me ask you a couple of questions first. Did you get to know Lisa Sorrell's parents during the course of this investigation?

A Yes, I did.

Q What are their names? Do you remember?

A Mr. and Ms. Nixon. I think that's the way I usually referred to them.

Q Did you talk with them frequently during the course of the investigation?

[113] A Practically every day.

Q Why were you talking with them practically every day?

A Because I felt it necessary in order to collect information both from people that they knew, friends of the family, and information concerning Mr. Sorrell.

Q Can you tell us about the kinds of information you gathered from them concerning Mr. Sorrell? Do you remember specific information? Or general kinds of information?

A We discussed their opinion of things that he would say, his expressions, his emphasis on certain words, where he was. Just everything he did.

Q Do you remember specifically why they were suspicious of Timothy Sorrell?

A Why they were?

Q Yes, why they were.

A I would say at the onset that they probably weren't. We talked to them, told them why we were, and I only assume that they drew the same conclusions.

Q So you discussed some of the information you had with the Nixons?

A Yes.

[114] Q As part of your investigation?

A Yes.

Q I'd like you to turn to the Respondent's Exhibit A in that book and look specifically at page three.

Do you see about two-thirds of the way down that page there is a statement that – well, can you identify that document for the Court, please?

A It appears to be – well, it is a brief filed by – it is a motion for judgment on the part of Herbert and Brenda Nixon.

Q Did you know about the motion for judgment that they filed seeking to bar Timothy Sorrell from receiving the proceeds of the life insurance policy that he had – that had been purchased on the life of Lisa and Shanta Sorrell?

A Yes. I knew that.

Q Did you discuss that possible suit with them before they filed it? Did they tell you about it, that they were planning to do that?

A I can't say for certain that I recall them discussing it or telling me that they were going to. I know that they did.

Q About two-thirds of the way down that page, page three, the judgment states, motion for judgment states that the Chesapeake Police Department received [115] this information from a female resident of Portsmouth that Timothy Sorrel had arrived at her house on the night his wife and child disappeared and said that they are dead, they were dead.

Do you know whether that's something that you may have told Mr. and Ms. Nixon?

A I don't know that I told them that. They may have told me that that occurred. And subsequently, we talked to her. I am not sure where that information originated, whether – whether it first became available to the police department or to Mr. and Ms. Nixon. And I'm not certain who this person is.

Q You don't know whether you spoke to her or not?

A Well, I don't know who it was. I don't recall who it is. I feel certain that if someone came with that information, that we did in fact talk to her. But sitting here right now, I can't tell you who it was.

Q Do you know whether Mr. and Ms. Nixon had contact with Timothy Sorrell, on the night that Lisa and Shanta Sorrell disappeared, whether Mr. and Ms. Nixon had any contact with Timothy Sorrell?

A Yes, they told me that they did.

Q And did they describe anything to you about that [116] contact that raised any further suspicions by you concerning Timothy Sorrell?

A I recall the conversation. I think the way it went is that they passed him at Greenbriar Mall. He was riding around Greenbriar Mall, and they passed him, and I think that he ignored them. I think that's the way it was.

Q Did Timothy Sorrell ever tell you that he had been at Greenbriar Mall that evening?

A I believe he did.

Q Did you follow up on that lead? Did he explain why he was there? Did he have any explanation?

A My recollection is that he was out looking for the car, as were many other people. That she was supposed to go to Greenbriar Mall. And I can only assume that he went there looking for the car.

Q But when the Nixons saw Mr. Sorrell at Greenbriar Mall, he just ignored them?

A That's what I recall them saying.

Q Did Ms. Nixon say anything to you about Timothy arriving at their house and his jeans being wet from the knees down?

A She may have. I don't recall.

Q Is there anything else you can recall about your conversation with them about that first evening, [117] their meetings with Timothy Sorrell, that raised any suspicions on your behalf?

A Not that I can recall. I mean, there were any number of things that made us suspicious. But to give you a list or confirm that these things you are talking about did occur, I can't do that. I mean, it wasn't something that we could go out and confirm whether or not his jeans were wet. And even if we did confirm they were wet, it wouldn't tell us anything. So I mean there is some things that we didn't investigate.

Q Did there come a time when you believed you could get an indictment against Timothy Sorrell?

A That I thought I could?

Q Uh-huh.

A Yes, I suppose so. I talked to the Commonwealth's Attorney about it.

Q So you thought you had a pretty strong case against him?

A I consulted the Commonwealth's Attorney.

Q Because you thought you had a pretty strong case against him?

A To see if he wanted to prosecute him.

Q But I assume that you wouldn't suggest that you seek an indictment against somebody unless you [118] thought you had a pretty strong case against them?

A Well, I have been involved in cases that maybe it was questionable whether it was pretty strong or not, and that's the Commonwealth's Attorney's job, to determine whether or not he wants to prosecute a case.

Q Who was the Chesapeake Commonwealth's Attorney at that time?

A Robert Kowalski.

Q And you consulted with him concerning whether an indictment should be sought against Timothy Sorrell?

A Yes.

Q And your position was what?

A What do you mean?

Q Did you take a position that either an indictment should be sought or should not be sought?

A I discussed it with him. I don't recall if I told him that I thought that he should. We discussed it.

Q Did there ever come a point in time when you became frustrated that Mr. Kowalski had not indicted Timothy Sorrell?

A I don't recall that.

Q Do you know whether any of your fellow officers were frustrated that an indictment was not sought [119] against Timothy Sorrell?

A I couldn't answer that. I don't know if they were frustrated about it or not.

Q Did you testify during the sentencing phase of Coleman Gray's capital murder trial on December 6th, 1985?

A Sentencing?

Q Right.

A Yes.

Q And did you do this at the request of Suffolk Commonwealth's Attorney Phil Ferguson?

A Yes.

Q Do you remember when he made this request?

A When he made what request?

Q When he asked you to be a witness or subpoenaed you to be a witness. Well, when did you first know that you would be a witness in Coleman Gray's sentencing phase of the capital murder trial?

A I'm not sure.

Q Do you know approximately how far in advance you knew you might be a witness in that trial?

A It would be a guess. I don't recall. I mean, it may have been a month or more or it may have been less. I don't recall. I don't even recall the date of the trial.

[120] Q All right. But you knew for some appreciable length of time, something more than just a week or a few days, that Mr. Ferguson might call upon you to testify?

A Yes.

Q At that time or at any time before the sentencing hearing, did you discuss the Sorrell case with Mr. Ferguson?

A Sure did.

Q And what did you tell him about the Sorrell case?

A I couldn't tell you what I told him. He presented his questions, and I answered them as best I could. But to tell you what I told him, I don't recall.

Q Did you give him access to your investigation files?

A Yes.

Q And did he take advantage of that and look through them?

A Yes.

Q Were you there when he did that? Did you review certain things with him?

A I'm sure I did. We may have sent him some of the documents or copies of the documents may have [121] been mailed to him or one of his investigators may have come and picked them up and reviewed them while we were not present. But I'm sure we did – we were present while he viewed some of them.

Q Do you remember about how far in advance of the Coleman Gray trial that you shared all this information with Mr. Ferguson?

A No.

Q Was it before you learned that you would be a witness or that you might be a witness?

A I don't clearly recall ever thinking I may or may not be a witness until I was subpoenaed or told that I would be getting a subpoena. Usually, when you are involved in something and it is going to go to trial, you are a witness.

Q Do you know whether you shared all this information with him – well, you developed Coleman Gray as a suspect at about what time?

A I think it was about a month after – excuse me.

(Witness perusing file.)

I think it was – I think it was the latter part of June, I believe.

Q All right.

A I don't have a date, but it was, I believe, in [122] June.

Q And you know that at that time, you knew that Mr. Gray was about to stand trial on capital murder charges in Suffolk?

A He had been arrested, yes. I don't recall the trial date, but he had been arrested for those charges, yes.

Q Knowing that he was standing under these charges in Suffolk, would it be logical for us to assume that at about that time you started to share information and discuss information with the Suffolk Commonwealth's Attorney's Office and the Suffolk Police Department concerning Coleman Gray and his case?

A The first time I became aware of this was when I had looked at some photographs from Suffolk Police Department. After I looked at those photographs, I contacted them and we began to discuss Mr. Gray.

Q That was in the late part of June, you believe?

A Yes.

Q Do you remember whether you told Mr. Ferguson or anyone in his office or anyone in the police department about the Nixon's lawsuit?

A It is a possibility. I don't recall.

Q Do you have information concerning their lawsuit [123] in your investigation files?

A I would assume that there would be a note in there, at least a note on it. I'm sure that there is a letter from one of the attorneys who asked me to respond to him. He came to police headquarters and talked with me about it. So I'm certain that there is some document in there.

Q Did Mr. Ferguson or another member of his office prepare you to testify at the sentencing phase of Coleman Gray's trial?

A He discussed with me certain questions that I would be asked before I went to testify. Yes. That's normally done.

Q Did he ask you not to testify about any specific information? For example, did he ask you not to mention that Timothy Sorrell had been a suspect in the Sorrell murders?

A No, I don't recall him saying that. I mean, it was testify to the fact. Don't testify to hearsay unless it is specifically requested and ruled on. But other than that, in the context of what we were going to talk about, I don't recall any instructions.

Q Do you remember whether as a result of that preparation, you made a conscious decision to avoid [124] mentioning Timothy Sorrell and his suspect status during your testimony?

A I don't recall that, no.

Q You know that Melvin Tucker testified before you during the sentencing phase of Coleman Gray's trial?

A I believe that he did.

Q Do you know Mr. Tucker?

A Yes.

Q Have you met him before?

A Only during the – following his arrest.

Q Following his arrest, did you interview him?

A I don't recall sitting and interviewing him. I recall a conversation with his attorney. He and his attorney talked in Suffolk and then I spoke with his attorney.

Q I might be able to refresh your recollection. Again, this December 15th, 1985 Virginia Pilot article states that investigators through a defense lawyer asked Melvin Tucker about the Sorrell killings. Is that consistent with your memory?

A Would you read that again?

Q Sure. Investigators through a defense lawyer asked Melvin Tucker about the Sorrell killings.

A Yes, I'd say that was accurate.

Q Were you the investigator who through a defense [125] lawyer asked Melvin Tucker about the Sorrell killings or were you one of the investigators?

A Although that article is accurate, my recollection is that that is not what occurred exactly. The conversation was through and probably should have contained the word with his attorney. My recollection is that Mr. Tucker was in custody at the Suffolk City Jail, and his attorney, I talked with his attorney and his attorney went in the back room and talked with him and he came out and told me what he said, part of what he said. But there wasn't an interview, a direct interview between me and Mr. Tucker at that time.

Q So did you approach his defense counsel and ask him to ask Mr. Tucker whether he knew if Coleman Gray was involved in the Sorrel murders?

A No. I didn't ask him if he would ask him if he knew that he was, no.

Q What did you ask him to do?

A I asked him what involvement there was, and the attorney told me that there was an involvement based on Mr. Tucker's statement, and that Mr. Tucker would testify. He gave me a brief description of what – at that time he didn't give me a description. He told me that he would testify.

[126] Q So you asked Mr. Tucker's counsel to ask Mr. Tucker what involvement Coleman Gray had in the Sorrell murders?

A Not in those words, but knowledge or involvement, yes.

Q Were you concerned that this approach might suggest to Tucker what you were looking for and create incentive for him to fabricate a story to help him cut a deal with the Commonwealth and avoid the electric chair?

A No.

Q You didn't have any concern about that whatsoever?

A No. What I said is, my comment to him did not cause me to think that that would occur.

Q Did you ever investigate whether Tucker was involved in the Sorrell murders?

A I never had any information that he was involved in them. And I never obtained any, that he was.

Q So you did nothing to eliminate him as a suspect even though that might explain his willingness to finger Coleman Gray?

A Well, you will have to clarify your question. You have a two-prong question. I can't answer that yes or no.

[127] MR. McLEES: I object to the question. It assumes a fact not in evidence. Melvin Tucker has never been identified as a suspect in the Sorrell murder case.

THE COURT: The objection is sustained. Go to another line.

BY MR. LEE:

Q Are you familiar with the United States Supreme Court's decision in BRADY v. MARYLAND?

MR. McLEES: Objection. Whether he is or isn't, he is not – I don't see the relevance of that.

THE COURT: Sustained.

BY MR. LEE:

Q Are you aware or do you know whether in the course of an investigation, in the course of pursuing a conviction against a defendant, the police and prosecutors have a duty to reveal exculpatory evidence to the defense?

A Certainly.

Q How do you know that?

A I can't tell you how I became aware of it, but I am. If you have exculpatory evidence, it is to be given to the defense.

Q Did you have an understanding concerning what [128] Mr. Ferguson was trying to do with Mr. Tucker's testimony, your testimony, and the testimony of Dr. Pressawalla, the Medical Examiner?

A Would you say that again?

Q Did you have an understanding concerning what Mr. Ferguson was trying to do during the penalty phase of Coleman Gray's capital murder trial with Melvin

Tucker's testimony, your testimony, and the testimony of Dr. Pressawalla?

MR. McLEES: Your Honor, objection. BRADY does not depend on the good faith or bad faith of this man or the prosecutor. He either had exculpatory evidence which wasn't given to them or he did not. Whether he knows what's going on in the Suffolk case or not is just totally beside the point.

THE COURT: No, he can answer that.

BY MR. LEE:

Q Would you like me to repeat the question?

A Yes.

Q Did you have an understanding concerning what Mr. Ferguson was trying to do during the penalty phase of Coleman Gray's capital murder trial with Melvin Tucker's testimony, your testimony and the testimony of Dr. Pressawalla?

[129] A Well, I'm not certain what they were testifying to, not having been in the courtroom when they testified. I could only assume that their testimony and my testimony would agree with the others in some respect or have some – one person may have a partial knowledge of certain facts that the other person had, or a statement, or that sort of thing. But I don't know what they testified to, so I couldn't tell you what he was doing.

Q While you sat there on the stand, did you think that the jury might find it important to know that Timothy Sorrell had been a prime suspect in these murders?

A Are you asking me if I had that thought?

Q Yes.

A I don't recall.

Q It didn't make you at all uneasy that you were up there testifying in Coleman Gray's capital murder trial, obviously to convince a jury that Coleman Gray committed these murders, without letting that jury know that Timothy Sorrell had been your prime suspect for most of your investigation?

A At that time, I did not have those feelings. I had no thought in my mind at that time that Mr. Sorrell was responsible for the murders.

[130] Q So Timothy Sorrell didn't remain suspect even after the Coleman Gray trial in your mind?

A No.

Q Did you ever tell either Mr. and Mrs. Nixon or their lawyer, who I believe was Sue Ellen Keefer, after the Coleman Gray trial, that this matter wasn't resolved as to Timothy and that he still remained a suspect for you?

A No. I don't remember telling them that. Once I saw the photographs associated with the Suffolk case, I had serious doubt about Mr. Sorrell and the bit of information I obtained from that point on increased my suspicion that Mr. Gray was involved.

Q Why has Coleman Gray never been indicted for the Sorrell murders?

MR. McLEES: Objections. It is not up to him to indict.

THE COURT: Sustained.

MR. LEE: Can I ask him whether he knows why?

THE COURT: No.

BY MR. LEE:

Q Again, going back to the December 15th, 1985 article in the Virginia Pilot, I know that you mentioned earlier that you have seen it. You are [131] quoted in there –

A Would you read the article again?

Q It is a December 15th, 1985 Virginia Pilot article. And you were quoted in it as saying that this case, the Coleman Gray case, I'm sorry, the Sorrell case, will not be settled for you until it is decided in Court because, and this is your quote, "A jury and judge conviction is like a certification that you are right. Anything short of a conviction is a maybe."

Did you say that?

A I don't specifically recall it, but I wouldn't be surprised that I did.

MR. LEE: I have no further questions.

THE COURT: Mr. McLees?

MR. McLEES: Your Honor, I anticipate our cross will be somewhat lengthy. Should we break for lunch now?

THE COURT: All right. We will stop now and come back at 2 o'clock, get started with the afternoon session.

(Luncheon recess taken from 12:51 p.m. to 2:05 p.m.)

THE COURT: All right. Let's have the witness back on the stand.

[132] (Detective Slezak assumed the witness stand.)

CROSS-EXAMINATION

BY MR. McLEES:

Q Detective Slezak, this morning when Mr. Lee questioned you about a report that Timothy Sorrell had said that Lisa Sorrell was dead, as I recall your testimony, if I understand it correctly, you recalled that you believed that there was a report from the Sorrell family – excuse me, from the Nixon family, Lisa Sorrell's parents, that Timothy had made this remark.

A Yes.

Q Have you had an opportunity over the lunch break to look at some materials to refresh your recollection about another report of Lisa Sorrell's death?

A Yes.

Q Supposedly from Timothy Sorrell?

A Yes.

Q From whom did you get that information?

A Ronald Cole.

Q Was there someone else who was with him and also communicated that same information.

A Yes, Michelle Davis.

Q When was this that they made this report to you, [133] sir?

A In June of 1985.

Q June of 1985 was roughly six months after Lisa Sorrell's death?

A Yes.

Q Was there a reward offered for information leading to the arrest and conviction of the person responsible for the Sorrell murders?

A Yes.

Q How much was that, sir?

A Crime Line had a $1,000 reward and I believe the church that the Nixons or the Sorrells went to offered, I believe, $10,000 in addition to that.

Q Had those rewards been publicized?

A Yes, they had.

Q Now, who were Michelle Davis and Ronald Cole?

A They were two individuals, a boyfriend and girlfriend, who lived in Cavalier Manor in the same neighborhood that the Sorrells lived in.

Q The same neighborhood that Timothy and Lisa Sorrell lived in?

A Yes.

Q I see. And how did they happen to come to you?

A One of the officers who knew a relative of Michelle Davis told us about them. I asked him to [134]

bring them to headquarters. They came in, we were introduced, and we interviewed them at that time.

Q And in those interviews, what in substance did they say with respect to the Sorrell murders?

A They said that they had been to a party on December 4th, and it was at the Sorrell house.

Q That's the day before the evening of the Sorrell murders?

A Yes.

Q Go ahead.

A That they were there. There were several people who were drug dealers also there.

Q Excuse me again, where was this party, supposedly?

A At the Sorrell house.

Q Timothy and Lisa Sorrell's house?

A Yes.

Q Go ahead.

A They had conversations with people there. They described the interior of the house. During the course of the evening, according to Ms. Davis and Mr. Cole, an individual took Lisa Sorrell into a bedroom, came out, and told Timothy Sorrell, laughing, that he had had intercourse with his wife and began to ridicule him. While they were there, several of the [135] individuals displayed a firearm. Mr. Cole said that – described the weapon as a .357 or a weapon which had a clip placed in the handle of it.

Q What about it was that specifically that he was describing?

A A weapon that they had at the house.

Q That who had at the house?

A One of the individuals in the house.

Q I see. Go ahead.

A Mr. Cole described it as a .357 or describing an automatic. Or Michelle Davis described it as a .357 and the other person described it as an automatic. I don't recall which. During that time there was a conversation that he overheard an individual there telling Mr. – or Mr. Sorrell discussing with him killing his wife.

Q What did they say that Mr. Sorrell said?

A Said that he had had a discussion with this individual about killing his wife.

Q I see.

A I don't believe that they had great details. Only that he wanted her killed.

We had several interviews with them. We discussed the kind of cars that they had and that sort of thing. When asked to describe the car that [136] she drove –

Q That who drove?

A Lisa Sorrell drove.

Q I see. Go ahead.

A He said that the car was at the house and it was a white car, small white car.

Q Was that an accurate description of Lisa Sorrell's car?

A No.

Q Go ahead.

A As the interviews with them continued, Sergeant Harrison and myself asked Michelle Davis and Ronald Cole to show us the house that this party took place at. They went, I believe, in the 800 block of Taft Road and described the house, pointed to a house that was in the 800 block. The Sorrells lived in the 900 block.

MR. LEE: Your Honor, I object right now. I have been waiting patiently, I thought that this was going to be something that was in the scope of my direct examination. I don't understand how it is and I don't know where it is going and I think this – I don't know what it is at all except I don't think it is in the scope of my direct examination.

THE COURT: Overruled.

[137] BY MR. McLEES:

Q Go ahead.

A The house that they described was on the opposite side of the street. The Sorrell house, in the back yard, there was a railroad track and then an expanse of undeveloped land. The house that they described had the rest of the housing project behind it. It was clear at that time –

Q Excuse me, the house that they pointed out, did it resemble the Sorrell house at all?

A Well, most of the houses there are basically two styles. It is a left design or a right design. And the house would have an attached garage or not have one.

Q With respect to its situation, its surroundings and that sort of thing, did it resemble the Sorrell house?

A It is the same style house.

Q The same style. But the Sorrell house had a railroad behind it and the other house had what behind it?

A The rest of the housing project.

Q Was it on the same side of the street?

A Opposite side of the street.

Q And this is in their own neighborhood?

[138] A Yes.

Q Did Cole or Davis report to you anything else that Sorrell had supposedly said to them after this party, after December 5th?

A Yes.

Q What was that?

A Mr. Cole said that he went to Greenbriar Mall and saw Mr. Sorrell there. He said as he saw him in the distance, he heard a gunshot. And Mr. Sorrell told him that he had just shot at Lisa's car.

Q And did when did this supposedly occur?

A December 5th, the day after the party at Mr. Sorrell's house.

Q At what time of day?

A I believe it was in the early afternoon.

Q The early afternoon of December 5th?

A Yes.

Q The day she was murdered.

A Yes.

Q Or disappeared. And this supposedly occurred at Greenbriar Mall?

A Yes.

Q I see. Did those facts comport with the facts you learned through your independent investigation of the Sorrell disappearance and the Sorrell murders?

[139] A I'm sorry, repeat the question.

Q Through your independent investigation, when had you learned that Lisa Sorrell was last seen alive?

A She was last seen alive about 4:30 on December 5th.

Q In the afternoon?

A Yes. Late afternoon.

Q And where were the bodies found, were they found at Greenbriar Mall?

A No.

Q Where were they found?

A They were found off Dahlberry Road on Cook's Mill Road. It is an unpaved road.

Q Now, you had explained that the car didn't match, the facts surrounding the shooting didn't match, and the house that they identified where they supposedly went to the Sorrell's house for the party didn't match.

A That's correct.

Q Were there any other difficulties or discrepancies – excuse me, and the descriptions of the guns didn't match. Were there any other discrepancies in these people's reports that you were able to detect and investigate?

A Yes, sir. Mr. Cole came in a few days later and [140] stated that – stated that the statement he had given us was a lie.

Q Did you question him about that?

A Briefly. I didn't go into the reasons that he would make the statement. It was a very brief discussion.

Q And have you or the other Chesapeake Police interviewed any of the people who were supposedly present at this party where they said that Timothy Sorrell made these incriminating statements?

A Yes.

Q What if anything did you learn from them?

A We went to the penitentiary and talked to a gentleman whose last name was Riddick. We asked him if he had been to a party in December of that year in Cavalier Manor. He said he had. We asked if there was a woman and a child there, and he said there was a woman and child there, along with some other people. We asked if there was a description of a gun there – asked him to

describe a gun, if anyone had one there. And he described a person having a .357. When asked if Tim Sorrell and Lisa Sorrell was there, he did not identify them as being there.

Q And this was one of the people who Cole and Davis had identified as being present at the [141] Sorrell's house?

A Yes, sir.

Q I see.

A Other individuals we talked to were not cooperative about it.

Q They wouldn't give you any information at all?

A Yes, sir. They just didn't want to talk to us.

Q I see. Is that unusual in investigating a criminal case in Chesapeake?

A No, sir.

THE COURT: Let me stop you just a moment. When Cole came in and indicated that he had lied, did he repudiate the entirety of the story or just the Greenbriar Mall part of it?

THE WITNESS: I can't tell you exactly what he said, Your Honor, but it was apparent to me that his statement in general was a lie. It was a fabrication.

THE COURT: Go ahead.

BY MR. McLEES:

Q Now, on direct examination, when you were testifying about developing Coleman Gray as a suspect in the

Sorrell murders, you told Mr. Lee and His Honor that you had looked at photographs from the Suffolk Police Department.

[142] A Yes, sir.

Q That was prior to the beginning of your development of Mr. Gray as a suspect.

A Yes, sir.

Q What photographs? Just in general, would you describe who those photographs depicted; what was the subject matter of them?

A They were Xerox copies of the photographs that they had taken of the victim.

Q That is, Mr. McClelland?

A Yes.

Q The Suffolk victim.

A Yes. And the interior of Mr. McClelland's car.

Q Which showed what?

A Which showed damage from a fire. The thing that stuck out in my mind was a match on the floorboard. We found a match inside the Sorrell vehicle. There was paper scattered inside and burned. The damage to the two cars were very similar. I showed the Xerox copies of Mr. McClelland's vehicle to the officer who had photographed and processed the Sorrell's car, and it was a few moments before he realized that they were not pictures of the Sorrell case.

Q Now, of course the – in the Chesapeake case, in the Sorrell case, you personally examined the [143] vehicle in which Lisa and Shanta were found, did you not?

A Yes, I did.

Q What had burned inside the vehicle?

A Paper, plastic bags, the visor on the car had melted down. There was – the plastic and vinyl inside the car burned.

Q What had started the fire?

A Apparently paper.

Q Was there any indication of accelerants used, that is, gasoline, kerosene, explosive?

A No, sir.

Q Now, in the Suffolk case, the McClelland murder, your understanding is that there were accelerants used there, or not?

A That's my understanding.

Q Gasoline or something of that nature?

A Gasoline.

Q Now, when you examined the Sorrell vehicle on the outside, what if anything – what did you detect unusual about the door handles on the exterior of the car?

A Portions of the exterior of the car were painted, were sprayed over with what appeared to be a flat black spray paint.

[144] Q For what apparent purpose?

A I believe it – the areas that were painted were areas of the car that a person would come in contact if they were opening doors or closing trunks, the trunk and that sort of thing.

Q To cover up whatever fingerprints might have been left?

A Yes.

Q Now, when a person plans a crime ahead of time, what precautions, in your experience, are likely to be taken if the person wants to be sure not to leave fingerprints behind?

A They wear gloves.

Q Is it your understanding that there were any identifiable fingerprints found in the McClelland vehicle in Suffolk?

A I don't believe so.

Q Do you have any knowledge that there was spray paint on the McClelland car?

A I don't think so.

Q So the person committing the Sorrell murders sprayed – felt they had to spray the handles of the door to cover up the fingerprints?

A Yes, sir.

Q The person committing the McClelland murder did [145] not.

A That's what I would assume, yes.

Q The person committing the Sorrell murders when they tried to set the interior of the car on fire, they didn't have any equipment to spread the fire around, any accelerants, any special equipment that we know of.

A Just paper.

Q The person committing the Suffolk murder, the McClelland murder, did?

A Yes.

Q The Sorrell murder was committed in December of 1984, wasn't it?

A Sorrell was, yes.

Q And the McClelland murder came in May of 1985?

A That's right.

Q With a serial killer, Detective Slezak, is it unusual in your experience for them to develop expertise and improve their methods of committing crimes and avoiding detection as they repeat their crime?

A I would expect that.

Q Is that unusual or is that something you would expect?

A No, I would expect somebody to do that.

[146] Q Very good, sir. Now, have you heard of Keith Godwin?

A Yes, sir.

MR. LEE: Your Honor, I object again. This is completely beyond the scope of my direct examination,

and as I understood your statement earlier today, we were here to find out whether adequate notice was given, whether adequate cross-examination was permitted and whether exculpatory evidence was withheld. Now Mr. McLees is trying to retry the Sorrell case.

THE COURT: I'll let Mr. McLees go ahead.

BY MR. McLEES:

Q Your Honor, I ask that the Marshal show Detective Slezak Respondent's Exhibit I from the book of Respondent's exhibits.

(Document proffered to witness.)

Have you ever seen that before?

A Yes, sir, I have.

Q What is that?

A It is a copy of a transcript of an interview with Keith Godwin.

Q By whom, sir?

A I believe it is Detective Bunker.

Q Of Suffolk Police Department?

[147] A Wally Bunker, I believe.

Q It is dated June 8th, 1985; is that right?

A Yes, sir.

Q Were you made aware of that or given a copy of that during your investigation of the Sorrell case?

A Yes, sir.

Q Approximately when did you learn of that statement from Mr. Godwin?

A I couldn't tell you specifically, but I feel confident that it was shortly after Suffolk received it.

Q So it would have been in the month of June, 1985?

A Oh, yes.

Q Have you read that statement in the past?

A Yes, sir, I have.

Q In general, it basically says that Coleman Gray told Keith Godwin that he committed the Sorrell murders, doesn't it?

A Yes.

Q And in Gray's statement to Godwin, it goes into considerable detail about how it happened, how he met them and what he did with them, doesn't it?

A In which statement?

Q In Gray's statement to Keith Godwin, which Keith [148] Godwin repeats in that statement to Detective Bunker.

A Oh, yes, sir, it does. It does contain details of what took place.

Q And it goes into some detail as far as Gray's comments about his present status, why he was in the Suffolk lockup that day?

A Yes, sir.

Q And how they had instituted the McClelland prosecution against him?

A Yes, sir.

Q And the fact that his wife was involved?

A Yes, sir.

Q And the fact that the only hard evidence they had to connect him with the McClelland murder was Melvin Tucker's testimony?

A Yes, sir.

Q Did this statement from Mr. Godwin enter into your calculation of how you should investigate the Sorrell murders from that point forward?

A Very much.

Q How did that influence you, sir?

A We had an occasion to talk with Mr. Godwin's attorney, Bruce Kushner. Mr. Kushner said that he had talked with his client at length and that he had [149] information that would be instrumental in clearing the Sorrell homicides.

Q And did you speak with Mr. Godwin? Or did you just read the statement?

A I have spoken with him, but in the context, there is no additional information other than what's contained in these documents.

Q Now, did you then at some point shortly thereafter contact Mr. Gray in the course of the Sorrell investigation?

A Yes. I did.

Q And in substance, what did you say to him?

A After looking at the photographs and then finding out about this, I wanted to – an opportunity to interrogate him that morning. I went to either Newport News or Hampton Jail, where he was being held. And I talked with him, and I told him a lie, in that we were getting ready to try Mr. Sorrell.

Q Timothy Sorrell?

A Yes. And that Mr. Gray, the possibility of evidence existed that Mr. Gray would interfere with the prosecution.

Q How was that? What did you mean by that?

A Well, the evidence that was available at that [150] point would make anyone think that he was – that Mr. Gray was involved in the Sorrell case. So I told him that we needed his assistance in clearing up these matters in an attempt to get him over to interrogate him.

Q I see. Now, at that point, did you have any hard evidence that Timothy Sorrell was involved in the murder of Lisa and Shanta Sorrell?

A No.

Q Go ahead, sir. What else, what transpired in your conversations with Mr. Gray?

A Mr. Gray came over and he denied any involvement in the Sorrell cases. We did not discuss the McClelland murder. I wanted him to feel comfortable talking to me and I didn't want him to think that I was attempting to implicate him. When I became aware that he was not

going to admit to the case, and I had gotten what information I thought we could have that we would get, I asked him to submit to fingerprints so that we could compare his fingerprints to the partial fingerprints that we had found at the scene of the Sorrell murders.

Q Did you have any identifiable fingerprints from the Sorrell murder scene?

A No, sir.

[151] Q But you told him you had?

A I told him we did. But we did not.

Q Go ahead.

A He agreed, gave us the fingerprints, and while I was talking with him, I told one of the other officers to come down to the room in 20 or 30 minutes or whatever and tell me that the ID tech wanted to see me. I just told him to go along with whatever plan we had. He came down and I balled [sic] him out for interrupting us.

Q This is while you were talking to Mr. Gray?

A Yes, sir.

Q Go ahead.

A I told him to wait, and he insisted that I go down to the laboratory. I apologized to Mr. Gray, I left and went down to where the technician was, and I waited there for 15 minutes or so, came back in and told Mr. Gray that out of 18 partial fingerprints, they had matched one of his fingerprints.

Q Was that true, sir?

A No. It was not true.

Q At that point, who in this world knew what you had told Coleman Gray?

A Just Mr. Gray and myself.

Q None of the other police detectives?

[152] A No.

Q No evidence technicians?

A No.

Q Just the two of you.

A Just the two of us.

Q Go ahead. What did you say then? Or what did he say?

A Well, he denied any involvement. We had talked about what the possibilities were of whose prints it could be.

Q Had you asked him before this if there was any innocent – any possible innocent explanation for his fingerprints being on anything in the Sorrell car?

A Yes. We had discussed whether or not he had worked at any Honda dealerships, if he had worked for the assembly plant or had anything to do with any part of assembly. He said that he didn't think fingerprints would be in there and that he didn't work for any of those places; that his fingerprints wouldn't be there.

Q There was no way his fingerprints would be in the Sorrell car?

A That's correct.

Q Go ahead. When you told him about the 18 prints [153] and the one that was his, what happened next?

A He denied it and said that he didn't have anything to do with the murder. I told him that I really didn't have any other questions for him, that I just wanted to know whether or not he had put the child in the trunk to save her or if it was to make her die slowly.

Q What was his reaction to that?

A He hung his head for an extended period of time without comment. Finally, he said, "You know, I didn't do it." I then took him to the Chesapeake City Jail, and he was there for several days. The Sheriff's Department returned him to either Newport News or Hampton.

Approximately –

Q Now, let me ask you this: After that conversation, did you tell anybody else about what you had told Mr. Gray about the 18 prints and the one identified as his?

A No, sir.

Q Go ahead, sir. Did you ever hear that report again?

A Yes.

Q How did that come about?

A I was contacted by Mr. Kowalski, the [154] Commonwealth's Attorney, and he told me that he had received a letter from an inmate named Larabee Farrell. In the letter which I read, Mr. Farrell said that he heard

Mr. Gray talking to another inmate, and during that time, Mr. Gray had said, made comments that implicated him as the murderer in the Sorrell homicides. Subsequently, we interviewed Mr. Farrell, and in Mr. Kowalski's office, while he was telling us the details, Mr. Farrell said that the conversation he had between himself and Mr. Gray, Mr. Gray said he – let me back up. Mr. Farrell quoted Mr. Gray as saying that the police department had 18 partial fingerprints that were found in the car, and only one of them matched him; that he wasn't worried about it. Mr. Farrell was quoted or quotes himself as saying, "You dumb ass, how many do you think they need?" At that point, Mr. Gray remarked, "I guess I touched the owner's manual when I went through the glove box."

Q Detective Slezak, had you told Larabee Farrell about what you had told Coleman Gray about the 18 prints and the one?

A No, sir.

Q Who is the only other person in the world he could have heard that from?

[155] A Mr. Gray.

Q Now, at that point, in your mind who was responsible for the Sorrell murders?

A Mr. Gray.

Q In your mind; at the time of trial, who was responsible for it?

A Mr. Gray.

Q In your mind today, who is responsible for it?

A Mr. Gray.

Q Have you ever had any hard evidence to connect Timothy Sorrell or anybody else with the Sorrell murders?

A No, sir.

Q For that matter, do you know whether Timothy Sorrell might have been involved in some way, perhaps hiring Mr. Gray to commit the Sorrell murder?

A It is a possibility.

Q Do you have any evidence?

A No, sir.

Q Or any live, credible leads that would be investigated that would have a prospect of leading to hard evidence to connect Timothy Sorrell or anybody else with the Sorrell murder?

A No, sir.

MR. McLEES: Thank you, detective. I have [156] nothing further right now.

THE COURT: Anything else for this witness?

MR. LEE: Yes. May I have a moment, Your Honor?

THE COURT: Sure.

MR. LEE: Your Honor, before I do my redirect examination, I'd like to move to examine the statements that Detective Slezak reviewed prior to testifying, the documents he says that he reviewed on our break,

because he used them to refresh his recollection and because I think I'm entitled to them under Rule 612 of the Federal Rules of Evidence so that I can effectively cross-examine him.

THE COURT: Give him what you reviewed during the break.

(Documents proffered to counsel.)

Do you need a few minutes?

MR. LEE: I think I do, Your Honor.

THE COURT: I'll give you ten minutes.

(Recess taken from 2:42 p.m. to 2:52 p.m.)

THE COURT: All right. Mr. Lee?

REDIRECT EXAMINATION

BY MR. LEE:

Q Detective Slezak, I have had an opportunity to read the things that you gave to me, the things that [157] you reviewed during our lunch break.

A Yes, sir.

Q Did you read this stuff carefully during the lunch break to refresh your recollection?

A I read part of it very carefully and the rest of it I scanned over.

Q Which parts did you read carefully and what did you scan over?

A Regarding a statement about Mr. Sorrell's statement to Mr. Cole about the mall and at the house.

Q And did you review Ms. Davis' statement, Valerie Davis' statement?

A The written one?

Q Yes.

A Yes, sir, I read that.

Q Okay. I'd like you to read it for the Court.

A You want me to read the whole statement?

Q Please.

A "On October 17th, 1984 my boyfriend, Ronald L. Cole, introduced me to Tim Sorrell and Lisa Sorrell. On this day we was over at their house as they were having a party. Terrence Riddick was present and he had told me that over $200 was stolen from him and he believed Lisa had taken it because the night before, [158] he had went to bed with her. Michael Benjamin and Tim would always go into the garage which was changed into a den and discuss things which they would always tell me was their private conversations. That night I left early. On December 4th, 1984, that night I also visited the Sorrell house. Mike Benjamin, my boyfriend, Tim, Lisa, and – I don't know what this says – some other people was present. They were talking about guns and telling what kind they had. Tim, a guy by the name of Lairt (phonetic) and Mike Benjamin all had .32's."

Q .32's?

A That's what it says. .32's. The bottom of it is – you can't read it. "Did I want to go to the mall with her and I said no, because I had to be home at 11. But I asked her could I keep Shanta and she said that was okay. Lisa went to her bedroom about 8:30 and did not return back out so I left about 10:30 that night. They also was drinking. The next day, which was December 5th, 1984, I left and went over to my sister's house early that morning and returned late that night. Cheryl, Ronald's sister, opened the door for me. I was there about 15 minutes when Tim and Mike Benjamin arrived. Tim didn't want to talk in front of me, so he asked me to leave, but [159] Ronald said that I could hear and that's when he began to tell us about his wife being shot six times across the forehead, and his daughter being put in the trunk of the car as someone set the car on fire.

"After he had talked –" the bottom line is not – I can't read it. "The next day, Ronald didn't remember what had happened that night and barely remembered what had happened that day, because he had been drinking. He said that Tim met him at the convenience store and told him to meet him at Greenbriar because he was doing something. So Ronald figured it was drugs, and he did. When Ronald arrived, he heard a gunshot and saw Tim coming towards him. Tim said he had just shot at the car. Ronald asked him what he was doing and Tim said that was okay, he had already done it. The type of gun was a .32 that he said – the type of gun was a .32 that he said his wife was shot with. And when Tim and Mike came to the house and discussed what had happened to his wife and daughter, he was at Ronald's mother's house in Cavalier."

"I asked Tim that night that he talk to Ronald. Was he present when his wife and daughter was killed, and his answer to me was none of my business.

"On the night Tim was over at Ronald's house, I [160] also asked him why would someone – I don't know the word – put the baby in the trunk and Tim said because they probably figured the baby would cry and someone would come and open the trunk and let the baby out. These statements are made about Tim and Lisa Sorrell by Tim Sorrell on Wednesday night about 12:40 a.m., the night Lisa and Shanta was killed. This was about a day after I saw Lisa Sorrell." It is signed by Ms. Davis.

Q Thank you. During cross-examination, you were very careful to tell us about conversations about and viewings of .357's or other automatic weapons but you didn't tell us anything about conversations about .32's. Why didn't you tell us about that stuff if it is in the statement?

A I was talking about the interviews that I had with them. This statement does say a .32. But I was talking about statements that they made to us.

Q You refreshed your recollection about these interviews during the lunch break by reviewing these statements.

A Yes, sir.

Q So what you are saying is they told you something different, but in writing, they said .32's?

[161] A Her statement says .32 here. The interviews that we had with them, one of them described .357's, and I think that was Ronald Cole. Valerie Davis described a

weapon by describing putting a clip in the bottom or putting a magazine in the bottom of the gun.

Q Didn't you think it might be important to the Court and to me and to Mr. McLees to know about the information about the .32's in that statement?

A If I was aware that the .32 was in there, I would have said it. I read this statement. I did not read this entire statement. The question that I was reading in here dealt later on with his statement at the mall, not at the beginning of it. I had already, in talking to them, knew that it was a false statement. My purpose in reading it wasn't to read the whole thing, it was to read that part about the mall.

Q So you just missed that stuff about the .32's.

A Yes, sir. That's exactly what it was.

Q Could I hand you this interview of Ronald Cole taped by video 6-10-85 by Detectives Slezak and Officer William L. Spruill. I'd like to refer the detective to pages nine and ten. And there is some colloquy about a gun starting about two-thirds of the [162] way down. Maybe you can read that for us.

A What he was doing?

Q Just if you could read, there is some testimony in there. There is some statements about a gun that I believe Timothy Sorrell may have been in possession of. It starts with a question.

A "Have you ever seen Tim Sorrell with a gun?"

Q Yes.

A Well – he couldn't understand the answer.

Slezak: Where were you when you saw him?

Cole: On the street. On the corner of Darren and Cavalier.

Slezak: Cavalier and what?

Michelle: Darren.

Slezak: Okay, what was he doing with the gun?

Cole: I don't know. He just had it. Just like, that's all I know.

Slezak: Tucked in his front, front of his pants?

Cole: Uh-huh.

Slezak: What kind of gun was it?

Cole: To be honest about it, right offhand, I couldn't tell you about no gun.

Slezak: Was it an automatic or a revolver?

Cole: See, all he did was like this, and he [163] pulled his shirt over it so nobody could see it so I, you know –

Slezak: What color was it?

Cole: Let's see, I know the color of the handle was –

Slezak: What color was it?

Cole: The handle was brown. It was brown.

Slezak: Okay.

Cole: But I ain't going to say it was his because a friend of him was out there so he might have left him – might have let him see it or something.

Slezak: Did – yeah. Could you have been – could it have been something other than the gun?

Cole: Not with a handle like that. I don't mean no harm. I mean, unless he carved it. I doubt that seriously.

Q That's probably enough. We don't need to go through the whole thing. During the break, I didn't have time to read that entire statement carefully. But maybe you can point to the parts of it where they talk about the .357's and the automatic weapons.

A No, this is – this statement, there is more than one statement on Ronald Cole. The question to [164] me was what statements did I read during the break. I read part of this statement, and I think there is another typewritten statement that I read part of.

Q There is an interview of Cheryl Cole. I'm not sure who Cheryl Cole is.

A I think it is his sister.

Q Okay.

A But I testified that I didn't read them in their entirety.

Q So your testimony is based on recollections that – it is based on refreshed memory after reviewing these in some – well, I don't understand exactly what you are saying. Are you saying that reading these prompted

memories of these discussions about the .357's and the automatics and other things?

A I'm not sure I understand your question.

Q I'm not sure I understand how during the break you regained these memories of these discussions about the guns, and that there were .357's and automatics and not .32's.

A The papers that I read in part were these. There is a stack. I was also given this stack of paper which I didn't read. I didn't have time to read the whole stack. I didn't read these.

Q During the break you mean?

[165] A Yes. So when I was asked to give you the papers that I looked at, I took those off that I had read through. I did not read them in their entirety. I read those things during the break regarding a statement that was made by Mr. Sorrell. That's what I was looking for in the statement. I recall talking with Mr. Cole and Michelle Davis about the description of the guns that they had. When I looked at this statement, I did not read it in its entirety. If it had been something that was presented as being truthful, I probably would have remembered every detail. But this statement and these other typed statements, the people that were telling me about it told me that it wasn't true. I haven't committed those things to memory. There are parts of them that I do vividly remember and there are other parts that I don't. I recognize that it was a statement that was given to me, and then I was told that it was not accurate.

Q I believe you said during cross-examination that one of your officers who knew Valerie Davis told you that they had information they would like to pass on to you.

A That Valerie Davis and Mr. Cole had information.

[166] Q Do you know whether Valerie Davis and Mr. Cole ever made a claim on this reward that you referred to earlier?

A I don't think they claimed it. I would have known if it had been awarded. But I don't think they made a claim to it.

Q Okay. Now, Ronald Cole told you that he heard Timothy Sorrell say, "I'm going to kill my wife"?

A No, Ronald Cole said that, in his statement, that he went to the mall and that Tim shot at him – shot at the car. At the house, he said that he heard a conversation between Mr. Sorrell and another individual that he wanted his wife killed. Now, it wasn't clear from his statement whether he wanted to do it or whether he wanted someone to do it. Or whether he intended to do it or he intended for someone else. I suppose you could conclude either way.

Q I suppose you could. And he said he saw Timothy Sorrell at the Greenbriar Mall and he said he heard a shot and Timothy Sorrell said, "I just shot at my wife's car."

A Yes.

Q And then later, Mr. Cole came to you and repudiated his statement?

[167] A Yes.

Q And you had a very brief discussion with him about that.

A Yes.

Q Very, very brief.

A Yes.

Q Did you ask him whether anyone had threatened or intimidated him?

A I did.

Q He said?

A He said that he had not been threatened.

Q If he had been, he had taken that threat seriously, would you have expected him to tell you about that?

A I don't understand.

Q Is this a common – do you have a common problem with witnesses down in the Tidewater area who refuse to or are unwilling to testify or to talk to you because they fear for their lives?

A Yes, it does occur. Now, Mr. Cole was assaulted after he – during the course of an interview with us, he told me that he was assaulted.

Q And Mr. Cole never said anything to you about Coleman Gray having committed this crime, did he?

A Never.

[168] Q Did Valerie Davis ever come to you and repudiate her statement?

A She was with Mr. Cole.

Q And she said to you "I repudiate my statement, also"?

A I don't think so. But the conversation, you know, he said that "We made up the story," that "It is not true." In those words or words very similar to them. But they were together but I don't know that Michelle Davis made a statement using the same words herself. She was present when it was made.

Q Did you speak with each of them separately?

A No, I spoke with them very briefly together.

Q And that was enough to convince you that there was nothing further to pursue concerning their statements?

A Well, I had already talked to some of the witnesses who said that the information they had was not correct. They identified a car that Ms. Sorrell did not have. They picked the wrong house. And then they told me that they were lying about it.

Q They picked the wrong house, but a house that looked like the Sorrell's house?

A Well, it was – the floorplan was very similar.

[169] Q I'm sorry, in response to Mr. McLees's questioning I thought you meant that the outside looked like it.

A It looks the same. Whether the color is the same or not, I don't recall. But the floorplan and the general appearance of the outside of the house is very, very

similar. It may be exactly the same. But it is obvious that it is not that house. They are on opposite sides of the street and the surroundings of the house are totally different.

Q Do you know whether they were doing drugs the night that they were talking about?

A Mr. Cole and Ms. Davis?

Q Yes.

A Mr. Cole said that they were.

Q 32 holds how many bullets?

A I guess it depends on the manufacturer. There are .32 single shots. You don't see very many of them. Probably most that you would see are going to be five or six shots.

Q Is it unusual in an execution-style murder for the killer to empty the weapon into the victim?

A Is it unusual?

Q Uh-huh.

A Using a revolver?

[170] Q Using a revolver. Or an automatic.

A Yeah, I would say that it occurs less frequently than a single shot.

Q Now, I understand it may occur less frequently. I'm talking about unusual.

A What is unusual?

Q Do you see those kinds of homicides down in the Tidewater area on a regular basis?

A I've seen two like this.

Q Is it unusual for a criminal to attempt to dispose of evidence?

A Unusual? No, sir.

Q Is it – do they sometimes do that by trying to burn it?

A Yes.

Q Have you seen burned vehicles in other cases?

A Yes.

Q Now, you were speaking about your interrogation of Mr. Gray, or your conversation with Mr. Gray. When you made up this story and told him a lie and then got it all rolling with the story about the ID man. Now, during all of that, your intent was to lead him to believe that you had evidence to inculpate him in the Sorrell murders; is that right?

A My intent in talking to him was to see if I [171] could get any information that I would be able to investigate. if the conversation with him would give me some leads as to what was taking place. I did not expect him to admit it, no. And when through the course of the interview he would tell me little things about whether he was driving his car that day or whether his wife was driving it, that was the type of information that I needed to check and see if I could verify it. In addition, I was hoping to give him some information that no one else had in hopes

that if he went – when he returned to jail, that if he said something to an inmate there, I would know whether or not he had in fact talked to an inmate.

Q So you expected him to just leave and go tell some inmate that he was suspected of these murders?

A No. I was hoping he would. And I knew that no one else knew that information so that if somebody did come to me and relay that information, then I would know that they did at least have the conversation.

Q Might not Coleman Gray have gone and said to somebody, "They questioned me about these Sorrell murders. They say there was one partial print out of 18 that they took"?

A It is possible.

[172] Q Couldn't a snitch take the story from there?

A He could.

Q That's what you said Larabee Farrell said that Coleman Gray talked about it, talked about the prints.

A Yes.

Q But it sounds like during your conversation with Mr. Gray, he was cooperative. He gave his prints and talked to you.

A Yes.

Q Did you have any other conversations with Mr. Gray during the course of your investigation?

A I talked to him in Newport News. I talked to him at the jail. I read him his rights and he didn't like one of

the statements. He didn't like the fact that the form had the word statement in it, so we just spoke briefly and I didn't talk to him that day. We were supposed to talk to him the following day. There was a power failure. So I talked to him on that occasion about generally what had happened and his wife was at the police station. I tried to talk with her, she would not talk to us. Then the last interview, the last interview that I had with him was this statement that we just discussed.

Q Your last interview was the one where you talked [173] about the prints?

A With Mr. Gray. Yes.

Q Do you know about when that conversation occurred?

A I would have to look through the file.

Q Do you know approximately?

A It was in July, I believe. July of 1985.

Q Did any other of your detectives speak with Mr. Gray during the course of all of this?

A I think if I might go back a minute, I think I may have talked to Mr. Gray one other time. I believe I may have. I don't know, it seems to me like it was in four or five or six months later I may have had another discussion with him. I'm not certain about that. But I believe that I did. Getting back to your last question, Sergeant Harrison was with me when we spoke with him briefly in Newport News or Hampton Jail, whichever.

Q Did anyone else ever speak with him, any of your other detectives?

A I don't think so.

Q Do you know whether you or Mr. Harrison or anyone in the Suffolk Police Department ever told Mr. Gray that there were inmates willing to testify that he was involved in the Sorrell murders?

[174] A I think that I had a discussion with him. I think that I did.

Q So you may have told him about Keith Godwin and Larabee Farrell and Melvin Tucker?

A I don't recall if I mentioned them by name. I may have said that there were some people who implicated him or something like that. I don't recall, and I really can't imagine me telling him, naming the people by name. I don't know any reason why I would have done that. It is possible, but I don't think I did.

MR. LEE: May I return to counsel table for a minute?

THE COURT: Yes.

(Counsel retrieving documents.)

MR. LEE: I need to show him the book of Respondent's exhibits.

BY MR. LEE:

Q I'd like you to turn to Exhibit I in Respondent's exhibit book.

Do you recognize that document?

A This is a statement taken between Mr. Gray and Wally Bunker.

Q Do you know Wally Bunker?

A Yes.

[175] Q Who is he?

A He is a police officer for the City of Suffolk.

Q Have you reviewed this in connection with your testimony today, this statement?

A I have looked at a portion of it. The portion that I had read from this recently was the portion that deals with Mr. Godwin's statement to – his statement about the Sorrells. The other statement dealing with McClelland, I didn't read.

Q You have mentioned Mr. Godwin a couple of times during cross-examination and we have talked about him a little bit now. And you have told us that Mr. Godwin's statement was some of the best evidence that you had against Coleman Gray.

A I don't know whether I said it was the best evidence. It certainly had an impact on me, yes.

Q Do you remember – let me ask you some questions about the statement about Keith Godwin. Have you met Keith Godwin before?

A No.

Q You never had an opportunity yourself to interview Mr. Godwin?

A No. I don't ever remember interviewing Mr. Godwin.

Q While you were investigating the Sorrell murders [176] and once you became interested in the McClelland

murders, I assume you made yourself very familiar with the facts of the McClelland case?

A No, sir, I didn't make myself familiar with the McClelland case. I looked at their evidence associated with the crime scene and I looked at photographs and possibly inventories, and the statement hereby Mr. Godwin. I didn't sit down and read through all of their paperwork. I mean, I went there and spoke with the detectives, asked them, you know, what information they had that would be associated with our case. But I haven't reviewed their case in its entirety. There is a great deal of information in that case that wouldn't be pertinent to ours.

Q Since Mr. Godwin was important to the prosecution of, or the potential prosecution of the Sorrell murders, I assume you were concerned with whether his statement was truthful?

A Certainly.

Q Did you notice when you reviewed his statement that nearly all of the facts were facts he could have culled from the newspaper reports about the McClelland and the Sorrell murders?

MR. McLEES: Objection. That assumes a [177] fact not in evidence. No one has testified to that.

THE COURT: He can answer it.

BY MR. LEE:

Q Were you familiar with the newspaper reports about the Sorrell murders and McClelland murders?

A Yes.

Q Do you remember after reviewing the Godwin statement ever having the impression that most of these facts were public facts made public through the news media?

A Yes. The vast majority of the information was available through the news media.

Q Do you know whether jailhouse snitches often fabricate their stories using newspapers?

A I would say that they could. I think it would be reasonable that some do.

Q Do you remember when you reviewed Mr. – either in connection with today's hearing or back when you were doing the investigation, do you remember noticing in Mr. Godwin's statement that he said that Mr. Gray, Mr. Tucker and Mr. Gray's wife were involved in the actual abduction of Mr. McClelland and that Mr. Gray used the .32, Mr. Tucker used the .25, and Melinda Gray used a knife?

A I'm not familiar with that aspect of the case. [178] I wasn't interested in all those details of his statement. The thing that came out and was important to me was Mr. Godwin's statement associated with the Sorrells.

Q So you didn't know that the evidence in the McClelland case was that Melinda Gray wasn't involved in the actual abduction?

A I wasn't aware that anyone had made a statement that Melinda Gray had a knife. That's something that I don't recall. That's new to me. And the fact that she

wasn't involved in the abduction, my understanding is that she was not a participant in that. But that's the first time that I recall hearing anything about the knife and Melinda Gray.

Q Did anyone ever tell you in conversations you may have had about Mr. Godwin that he had committed so many robberies in the Tidewater area that not only was he facing a lengthy prison sentence but that he would be ineligible for parole under the habitual offender statute?

A Yes.

Q Did that concern you regarding whether he may have fabricated his statement?

A Yes.

Q Do you know whether Mr. Godwin testified during [179] the sentencing phase of Coleman Gray's capital murder trial?

A I think he did not.

Q So he decided not to testify to the best of your knowledge?

A To the best of my knowledge, he did not testify.

Q Now, as I understand it, you had the statement of Larabee Farrell and you had the statement of Keith Godwin, the statement of Melvin Tucker implicating Coleman Gray in the Sorrell murders.

A Yes, sir.

Q All convicted felons.

A I'm not sure about Farrell. But the others I'm pretty sure about. But I'm not sure about Farrell at that time. He may be.

Q Now, during cross-examination, you said that you don't have any hard evidence against Timothy Sorrell.

A I don't have any hard evidence, physical evidence, nothing tangible.

Q Yet you decided that you should approach Mr. Kowalski concerning whether an indictment should be sought against Mr. Sorrell.

A Yes.

[180] Q So you had at least a strong enough case to raise that possibility and to make that conversation necessary.

A I discussed it with him, and asked him what he wanted to do.

Q Now, you were willing to – Mr. Godwin didn't testify, Mr. Farrell didn't testify during the sentencing phase of Coleman Gray's trial. You had statements made by two citizens, I don't know whether they had felony records or not, but two people came to you and told you that they had heard Timothy Sorrell talk about killing his wife; that they had seen him at the Greenbriar Mall; said some pretty damaging things about Timothy Sorrell. Later, like I guess Mr. Godwin and Mr. Farrell, came and said that this is all a lie, you didn't press them at all.

A I never recall anyone saying that Mr. Godwin ever said that his statement was a lie. Nor do I recall ever

hearing anyone say that Larabee Farrell said that his statement was a lie. I do recall Ronald Cole saying that he lied. Or that "we lied," referring to Michelle Davis and himself.

Q I think just one final thing. I'm just a little puzzled. During direct examination, you talked an awful lot about Timothy Sorrell and about the way [181] your investigation focused on him and why it did and what you did and about the insurance policy that he took out on his wife's life just maybe two weeks before this happened, and about your inability to eliminate him as a suspect for quite some time, apparently sometime after Coleman Gray started coming into the picture given the certificate of analysis that we saw. We know you talked with Mr. Kowalski about whether you ought to seek an indictment. Yet today you are telling us that you didn't have anything that you consider to be hard evidence against him. I'm wondering, that all sounds like pretty strong evidence. I wouldn't expect you to go to the Commonwealth's Attorney talking about an indictment without strong evidence. What's the difference between strong evidence and hard evidence?

MR. McLEES: The witness didn't say any of that was strong evidence. That's counsel testifying.

THE COURT: No, that's a fair question.

THE WITNESS: There is circumstantial evidence and then there is physical evidence, tangible evidence.

BY MR. LEE:

[182] Q So what you are saying is circumstantial evidence can't rise to the level of strong –

A I'm not saying that at all. I'm saying there was a lot of circumstantial evidence associated with Mr. Sorrell and I went and discussed that with Mr. Kowalski, about indicting him. Mr. Kowalski declined.

Q And Mr. Kowalski never sought an indictment for Coleman Gray, either, did he?

A Well, I discussed that with Mr. Kowalski.

Q But he didn't.

A No, he did not.

MR. LEE: I have no further questions, Your Honor.

THE COURT: All right.

MR. McLEES: May I have a brief recross, Your Honor?

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MR. McLEES:

Q In the statement that Cole and Davis gave you, and the remarks they attributed to Timothy Sorrell about his wife's death, is it correct that they said that he said that she had been shot six times across the forehead?

[183] A That's what he said.

Q Was she in fact shot six times across the forehead?

A No, sir.

Q Where was she shot?

A She was shot in the – I have to think about it. It is not exactly in the back of the head, it is slightly off center, more to the rear than to the front.

Q Now, they asked about whether Mr. Cole and Ms. Davis ever claimed the reward. The reward had to be for information that had led to the arrest and conviction of someone, didn't it?

A Yes.

Q And of course, their information was withdrawn by them within days of giving it to you.

A Yes.

Q When they came in and told you it was a lie.

A Yes, sir.

Q Is it any surprise they didn't claim the reward?

A No, sir.

Q With respect to details for Mr. Godwin's statement having been reported in the newspaper, are you aware of any news reports concerning the [184] McClelland case that reported that a lady detective and a man detective came to visit Gray at the Suffolk Sheriff's holding cell on May 23rd?

A I don't recall one.

Q Was that reported in the news to your knowledge?

A I don't recall reading it.

Q Do you recall reading anything about the male detective being a sergeant with blond hair and a moustache and the woman having long dark hair and driving a red Nova; was that reported in the news?

A I don't recall reading it.

Q Was it reported in the news that the detectives on May 23rd, in talking to Mr. Gray at the Sheriff's Department or sometime before that, had told them he wasn't telling them everything and they had gotten other information from his wife; do you recall reading that in the newspaper?

A No, sir.

Q Do you recall reading in the news a report that Mr. Gray was being kept in the – they didn't want to keep him in the Suffolk jail because they had Melvin Tucker in the Suffolk jail?

A No, I don't recall reading that, either. Not in the newspaper.

[185] Q Do you recall any report in the newspaper about Mr. Gray arguing with the detectives about the conditions he was kept under and not having been given a shower and that sort of thing?

A No, sir.

Q Do you recall any report in the newspapers of June, 1985, about Coleman Wayne Gray's criminal record,

and specifically, that he went to the penitentiary in 1977 on a 21-year sentence and got out on parole in 1983?

A I didn't read anything that detailed, but there may have been a reference to his record.

Q In June of 1985?

A In June? I doubt it.

Q Or before that, with that detailing?

A No, sir. Not detail like that.

Q When you are investigating a homicide and you have suspects, under what conditions do you frequently or routinely go to the Commonwealth's Attorney to discuss suspects or discuss the possibility of getting indictments? Is that an unusual occurrence?

A No. There is nothing unusual about that.

Q Does that indicate that you think that you have a strong case or you are of the opinion you are ready [186] to get an indictment and convict that person?

A Not just because we discuss it, no.

Q Now, Mr. Lee asked you quite a few legal questions about what's hard evidence, what's strong evidence, what's circumstantial evidence. To your knowledge, did you have anything that would have been admissible in Court to prove that Timothy Sorrell was connected to the Sorrell murders?

A Only statements that people made. Only circumstantial evidence.

Q What statement are you referring to, sir?

A I'm saying that the only thing that was there that raised suspicion or that could be used would be statements. There are no – there was no physical evidence involved.

Q What statements are you referring to?

A No statement that he specifically did anything.

Q What statement are you referring to that could have been admitted in Court?

A There are no statements that Mr. Sorrell did the crime. That he murdered anyone. There are no statements as such. What I am saying is that the only thing that could be used in a criminal proceeding would be statements in general.

Q Such as?

[187] A But none associated with him.

Q Well, in 22 years of experience as a police officer, have you ever been allowed to testify in a jury trial in a criminal case to your subjective impression that somebody acted defensive when you questioned them?

A I can't recall any. I don't think so.

Q Would you be allowed to testify that he refused – that he refused to talk to you because he wanted to see his lawyer?

A No. It could not.

Q By the way, in the course of investigating the Sorrell murders, did you develop any information that provided a logical explanation for why Mr. Sorrell was acting defensive with you?

A Yes.

Q What was that, sir?

A Shortly after we found Ms. Sorrell, in going through her effects, we found some checks that were written to her by various people in the area. We went to those people and found that she was selling them cameras, tape-recorders, radios, and other similar items. The origin of those items we were not able to determine. We made inquiries with the Naval Investigative Service to see if they could identify [188] these items as being items that were taken from Mr. Sorrell's place of employment, but they were not able to do so.

Q Where did Mr. Sorrell work?

A The Naval Supply Center.

Q Were these items of a similar nature to items sold in the establishment where he worked?

A Yes, sir.

Q Did the Naval Investigative Service have any information about such items being missing or short on inventory?

A No, sir. Their inventory control was not accurate.

Q They didn't keep a close inventory?

A No, sir.

Q What was your conclusion as to the logical reason why Mr. Sorrell was being defensive with you?

A I believe that he was concerned with criminal prosecution.

Q In connection with?

A The items that we recovered.

Q Mr. Lee has pointed out that there is a lab report that you got from the lab in July of 1985 in the Sorrell case that lists Timothy Sorrell in the name of suspect on the front page. What's the [189] significance of that?

A Only to identify the case.

Q Does that signify that in July of 1985, you regarded Timothy Sorrell as a suspect?

A No, sir.

MR. McLEES: Nothing further, Your Honor.

THE COURT: All right.

MR. LEE: Your Honor?

THE COURT: Go ahead. You can have the last word on this.

REDIRECT EXAMINATION

BY MR. LEE:

Q Detective Slezak, just a couple brief questions. You mentioned that when Lisa Sorrell's body was recovered you found these checks and when you traced them back you learned that she, as I understand your testimony any way, that she had been selling certain items to people in the community that may have been taken from the naval shipyard?

A No, from the Naval Supply Center.

Q From the Naval Supply Center.

A Yes.

Q Where did Timothy Sorrell work during all this time?

A The Naval Supply Center.

[190] Q Was he involved, do you know whether he was involved in some sort of theft ring; did you investigate that?

A We made some inquiries with the Naval Investigative Service, and there was no determination made.

Q Were they investigating whether he was part of a theft ring?

A They were trying to determine whether or not the items that we had recovered were government property. And they were unable to do that. Now, what they did beyond that, I have no idea.

Q So you discovered a possibility that Timothy Sorrell and his wife were involved together in some sort of theft ring or theft operation concerning the Naval Supply Center?

A Yes. We investigated that.

Q Did you investigate whether their involvement in that activity may have had something to do with her death?

A We looked into that. We looked into the whole situation as best we could, yes.

Q And what did you learn?

A Nothing.

Q Did you consider whether their joint involvement [191] in that theft ring may have been one more motive for Timothy Sorrell?

A We considered it.

Q And you abandoned that idea?

A Eventually.

Q Any reason?

A Once I became familiar with the case with Mr. Gray, yes.

MR. LEE: I don't have any further questions.

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[Caption Omitted in Printing]

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[274] Q You mentioned the Certificates of Analysis. I believe they are Exhibit 3 in the exhibit book. If the witness could be handed that.

(Documents proffered to witness.)

Mr. Brown, are you generally familiar with exhibits 3-A through G, Petitioner's Exhibits 3-A through G?

A Yes, I've reviewed them.

Q Have you reviewed them as part of your investigation?

A Yes, I have.

Q Just generally, do you find anything in those certificates that you consider to be significant with respect to your investigation?

A There was one –

MR. McLEES: Objection. It calls for a conclusion on the part of the witness and it is vague and it may very well be irrelevant.

MR. TURNER: I just wanted to ask Mr. Brown, since he used, reviewed these documents in his investigation, if there was anything in them that he found significant in his effort to determine what happened with respect to the Sorrell matter.

MR. McLEES: I think if there is anything counsel considers significant, he can ask him a [275] specific question.

THE COURT: Why don't you do that. You are talking about something substantive in the certificate?

MR. TURNER: Right.

THE COURT: Do that. Just point to it.

MR. TURNER: Your Honor, in fact, I understood clearly the parameters that you first mentioned yesterday, and totally am comfortable with those. The reason I'm going beyond those today was because my understanding was that was the way it was going to be done today, that Mr. McLees would be putting on evidence and that's why I am, frankly.

THE COURT: To a certain point. For instance, these certificates, the prosecutor has indicated he didn't know anything about them. So how much impact that's going to have on my decision, I don't know. But I'll let you go. But don't get too ridiculous.

BY MR. TURNER:

Q Mr. Brown, after reviewing those certificates as part of your investigation, did you see anything in them that you found to be significant for your work? A Two things. One thing, the suspect or a suspect was named on the certificates in the name of Timothy [267] Sorrell. Another point that I observed was there was a hair fragment that was found in the vehicle, also Timothy Sorrell's. In an interview that I had conducted with Mr. Herbert and Brenda Nixon, they had advised me that Lisa Sorrell, the deceased –

MR. McLEES: Objection, hearsay.

THE COURT: Sustained.

MR. TURNER: At a later date, I will connect up the Nixon interview. I have a reason why I believe that is not hearsay. But we can pass that by for the moment. I can argue that in just a little bit.

THE COURT: All right.

THE WITNESS: The Nixons had advised me –

BY MR. TURNER:

Q You can't go on at this point on that. Is there any other item that you recall in those documents that you found?

A The other item was a hair fragment that was found. I had information that Mr. Sorrell did not –

MR. McLEES: Objection, Your Honor. He is not even stating the source of his information now. Hearsay.

[277] THE COURT: Sustained. Move on.

BY MR. TURNER:

Q Did there come a time when you interviewed Herbert and Brenda Nixon?

A Yes, there was. I conducted several interviews with the Nixons.

Q Did you ask the Nixons questions about the Sorrell matter?

A. Yes, I did.

Q Did the Nixons relate to you any information that either they provided the Chesapeake Police Department, and specifically, Detective Michael Slezak, or information that Detective Michael Slezak provided to them concerning the Sorrell murders?

A Yes. Both.

MR. TURNER: Your Honor, I'd like to proceed with questions in this area. The evidence is not being offered –

THE COURT: Go ahead.

MR. McLEES: I would object. From this witness it is hearsay and not within his personal knowledge.

THE COURT: I'll let him testify to what the Nixons indicated to him that they had informed Slezak and what he told them.

[278] BY MR. TURNER:

Q Mr. Brown, first, what did the Nixons indicate they had informed Detective Slezak concerning the Sorrell murders?

A They had indicated that they had provided him with the events that took place on December 5th; that Lisa has came to their residence around 4 p.m. to pick up Shanta. Also, that Lisa had – was engaged in a conversation with her husband, Timothy, concerning a change of plans which resulted in Lisa going to the Greenbriar Mall to take Shanta to have photograph taken with Santa Claus. It had originally been scheduled for the following Saturday. In addition to that, there was information that Lisa had attended or stopped at Wendy's Restaurant and

consumed a baked potato, and that she had went to a bank to purchase money orders.

They also indicated that around 7:00 to 7:30, they had received a phone call from Timothy Sorrell requesting the whereabouts of Lisa. At that point, she didn't know where Lisa was and became worried. From there, she began to call Lisa's residence in 5-minute intervals to see if she could make contact. Around 10:00 to 10:30, again, there wasn't any contact at the residence. Timothy called again [279] indicating again what had happened or had she heard from Lisa. Shortly after his phone call, he showed up at the Nixon's residence. When he came in the door, Mrs. Nixon stated that he was crying. And there were conversations of what had happened with Lisa. Neither of them knew at that point, but Mrs. Nixon indicated to me that her mother's instincts indicated to her that something was wrong and possibly Timothy was involved.

MR. McLEES: Your Honor, at this point I object. Not only is it hearsay, not within his personal knowledge, but it is not within the facts known to the declarant. Mother's instinct?

THE COURT: This is simply informing me of what they told Slezak and I want to know that. Go ahead.

THE WITNESS: Other information they had told Detective Slezak was later that evening, there were a meeting at the Sorrell's residence of the families concerning what to do. And in her – she was confused about what was going on with her daughter so she wanted to do something. She went into a hamper to wash clothes,

and she pulled out a pair of jeans, and she had remembered that these jeans were the same jeans that Timothy had on prior [280] to him coming to the house. The point about the jeans, she indicated to me that the jeans were soaked from the knees down. They were wet. They were soaking wet.

She went on to tell me about Slezak. They were very close, to the point that Detective Slezak may have even encountered some kind of flack or grief from his department because they exchanged information on a daily basis.

Other points, she indicated that there were bullet fragments found in the rear of the automobile.

Q Did Mrs. Nixon indicate that she had learned anything from Detective Slezak concerning the crime; that he had provided her with any information that he had concerning the Sorrell murders?

A He had provided them with information concerning there was some form of paint maybe used, that a money order had been purchased. He advised them of the stop at Wendy's because of, I guess, Certificate of Analysis. Give me a moment to remember.

Q Was anything said concerning the United States Navy, any installation?

A Yes, there were a lot of conversations concerning Timothy's employment. It seems their son, [281] Cary Nixon, had assisted Timothy in getting employment with the Naval Exchange. In less than six months, Timothy had become a supervisor of the Naval Exchange. During that time period, a major theft ring existed at the exchange. It

seemed like Timothy was a participant or associated with the participants in this ring.

Lisa had become disturbed because there was a visit a week prior to her death from a gentleman either possessing stolen merchandise or in conversation with Timothy concerning stolen merchandise. Lisa had brought this to the attention of her mother, and shortly after the death of Lisa, the Nixons provided this information to Detective Slezak. From what they had indicated to me, Detective Slezak, Chesapeake Police Department, had confiscated this merchandise from an uncle of Timothy Sorrell's.

Q Was there any information that Ms. – strike that. Did Mrs. Nixon ever indicate to you that either she to Detective Slezak, she or her husband, or Detective Slezak to her ever suggested who might be responsible for the Sorrell murders?

A Yes. They felt Timothy Sorrell was responsible for the murder, very strongly, from his actions [282] coming in the door the night of the fifth crying, throughout various points of nervousness and not carrying on his normal activities. It seems from that point, he and his brother began to associate very closely, always going places together.

Q Did Mr. and Mrs. Nixon ever mention to you that they had discussed with Detective Slezak anything to do with drugs?

A I can't recall anything to do with drugs from a conversation with the Nixons.

Q Is there anything else with respect to the evening of December 5th, 1985 – excuse me, 1984, that you can

recall as to Timothy's activities that evening, the Nixons said that they discussed with Detective Slezak?

A Another point that was raised, Timothy had basically, or he was under the pretense that he was at school on that evening. Detective Slezak had verified that he was not at school on that evening, but that he was at a female friend's home when he made the phone call, the 7 o'clock, 7:30 phone call.

Q Did you talk with Detective Slezak about this case?

A Yes. We had a brief interview with Detective Slezak at the Chesapeake Police Department.

[283] Q Did he acknowledge that he had had extensive he contacts with the Nixons?

A Yes, he did.

Q And that information was passed freely back and forth between him and the Nixons?

A I can't actually say he told me that. He was reluctant in discussing some information with me. But he did imply that the Nixons and he were on a first-name, friendly basis dealing with this case.

Q Was there any indication that the Nixons had had contact with Detective Slezak throughout the whole investigation of the Sorrell murder?

A That was my impression.

Q Have you talked with anybody else who had contact, that you know at least, with Detective Slezak or any other law enforcement authorities?

A Yes, the son, Cary Nixon, had quite a bit of contact with Detective Slezak as well. It seems like there may have been one point when Detective was requesting Slezak additional names or information the Nixon's son.

Q Do you have any knowledge of information that Cary Nixon either passed to Detective received from Detective Slezak or Slezak?

A No, I don't have any. It wasn't – he didn't [284] elaborate on what information he had passed to the detective

Q Is there any other witness you have interviewed that you know of that had contact with law enforcement authorities with respect to the Sorrell matter?

A That had contact with the law enforcement?

Q Right, any law enforcement authorities, either in Chesapeake, Suffolk, or wherever.

A The brother, Timothy Nixon. Excuse me, Timothy Sorrell.

Q Who was that?

A His name is Cary Sorrell.

Q In general, what contact did he have with law enforcement authorities that he shared with you concerning the Sorrell matter?

A He basically shared a harassment relationship with the police department and him.

Q Had he been charged with any crimes, to your knowledge?

A Yes. He was charged with possession of a small amount of cocaine. It seems that there was a female by the name of Cynthia Talatano. It is believed that she is an informant for the Chesapeake Police Department. She came into the picture by a visit to [285] the Nixons shortly after the murder. It seemed to be a bogus visit. The Nixons didn't relate any point to the visit, other than that she came looking for Timothy Sorrell. And she left. There was some relationship or Cynthia became involved with Cary, a very short relationship where they traveled someplace and they were arrested by the police.

Q In the course of your investigation, Mr. Brown, I assume you were informed, I believe, of who Coleman Wayne Gray is?

A Yes.

Q You understood, I believe, that I was representing Mr. Gray?

Q During the course of your investigation which I understand has been over a year-and-a-half to 23 years, have you come across any information at all which in your professional judgment would connect Mr. Gray to the Sorrell Murders?

A I have not

MR. TURNER: Thank you, Mr. Brown.

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[Caption Omitted In Printing]

[293] THE COURT: Obviously. All right, you can call your first witness.

MR. McLEES: Brenda Nixon.

BRENDA NIXON,

called as a witness by and on behalf of the Respondent, having been first duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McLEES:

Q Good morning, ma'am. Would you state your name for the record, please?

A Brenda J. Nixon.

Q In December of 1984, did you suffer the death of [294] your daughter and your granddaughter?

A Yes, I did.

Q There names were what?

A Lisa Renae Nixon Sorrell, Shanta Sorrell.

Q Shanta was how old, ma'am?

A Three.

Q I'm going to ask the Marshal to show you a photograph that has been marked and received. The photograph has been marked Respondent's Exhibit E. Copies

of it have been admitted in evidence as Respondent's Exhibit E. I don't know if Your Honor would like to see the original.

THE COURT: No

(Document proffered to witness.)

BY MR. McLEES:

Q Is that your property, ma'am?

A Yes.

Q Who is depicted in that photograph?

A Lisa and Shanta.

Q Roughly when was that taken, do you know?

A I'm not sure of the date.

Q Within a year or so –

A She got that coat for Christmas. I do know that.

Q Do you remember what day you last saw them them [295] alive, ma'am?

A On Wednesday, the fifth of December, 1984.

Q And where was it that you last saw them alive?

A At my home in Chesapeake.

Q How far is your home from Greenbriar Mall?

A Approximately two miles.

Q How did they come to be visiting at your home on December 5th, 1984?

A Shanta was in pre-school, and I had taken her. Lisa came to pick her up in the afternoon from my house. She left the job something like 3:00 or 3:30 and come directly there to pick the baby up.

Q What time did they leave?

A Between –

Q Excuse me, what time did Lisa come to pick Shanta up?

A She was there no later than 4:30.

Q What time did they leave?

A Between 4:30 and quarter to 5.

Q Did you ever hear from them again?

A No.

Q Did you ever see them alive again?

A No.

Q Now, I am going to ask the Marshal to show you a newspaper clipping, a copy of which has been entered [296] as Respondent's Exhibit F-1. Have you ever seen that clipping before, ma'am?

A Yes.

Q Did you cut that out of the paper?

A Yes.

Q And what do you remember and what – paper that was published in?

A The Virginia Pilot.

Q Approximately when?

A The funeral was the 15th. Probably a week after the funeral.

Q That depicts what, ma'am?

A Excuse me?

Q What does that show?

A A picture of Shanta and Lisa and it is the obituary from the funeral.

Q I will ask the Marshal to show you another clipping, a copy of which has been admitted as Respondent's Exhibit F-2. What is that, ma'am?

A This is the picture that was taken when they found them.

Q When was that published, roughly?

A December, let's see, it was five days before they found them, so it had to be around the 10th, something like that.

[297] Q Of 1984?

A 1984.

Q Those are pictures of whom in that clipping?

A It is a picture ever Shanta and Lisa.

Q I am going to ask the Marshal to show you a clipping, a copy of which has been admitted as Respondent's Exhibit P-1. Where was that published, ma'am?

A This was taken from the Virginia Pilot, also.

Q And there is no date on that clipping, is there?

A No.

Q Directing your attention to the second paragraph in that clipping, does the article state when the bodies were found?

A Yes.

Q It says the bodies of Lisa Sorrell and her daughter, Shanta, were found Monday?

A Uh-huh.

Q So it was published within a week or so after the bodies were found?

A Right, yes.

Q And directing your attention to the first sentence of that clipping, could you read that, please?

[298] A The one that says, "A church"?

Q Yes, ma'am.

A "A church and a radio station have collected about $5,000 for a reward fund for information leading to the arrest in the slaying of a Portsmouth woman and her three-year-old daughter."

Q And directing your attention to the last full paragraph on that clipping, could you read the first sentence of that?

A "Organizers hope to have $10,000 by Monday."

Q Thank you. That's enough. I am going to ask the Marshal to show you a clipping, a copy of which has been

admitted as Respondent's Exhibit P-2. That was published where, ma'am?

A Virginia Pilot.

Q What's the date on that?

A January 7th, 1986.

Q 1986. So it is the month after Mr. Gray's trial?

A Yes.

Q And would you read the first sentence of that article, please?

A With "Commonwealth's Attorney"?

Q Yes, ma'am.

A "Robert E. Kowalski, Jr. has signed an affidavit [299] affirming that Timothy Sorrell is no longer a suspect in the year old slaying of his wife and daughter, apparently clearing the way for Sorrell to claim about $60,000 in disputed life insurance money."

Q Thank you. I am going to ask the Marshal to show you a clipping, a copy of which has been admitted at Respondent's Exhibit P-3. And I will ask if you can identify that, please.

A Yes.

Q When was that published, ma'am?

A This was published Monday, April 8th, 1985.

Q In what newspaper?

A Virginia Pilot.

Q Directing your attention to the second page of that article, ma'am, in the first column, the left-most column, at the bottom of that column, could you begin reading that paragraph where it begins the investigators, please?

A "The investigators say the case had been hampered by little assistance from the community, despite an $11,000 reward offered by police, area radio station, Chesapeake church. 'The main problem here is that we have information coming in from the victims' parents and her side of the family. That's the extent of it,' Slezak said."

[300] Q Go on. The next sentence?

A "Timothy Sorrell, Lisa Sorrell's widower, declined to comment at the instructions of his lawyer."

Q Thank you. And of course all these articles are referring to the investigation of your daughter's and granddaughter's death?

A Yes.

Q I ask the Marshal to show you a clipping, a copy of which has been admitted as Respondent's Exhibit P-4 and ask you if you can identify that.

A Yes.

Q In what newspaper was that published?

A Virginia Pilot.

Q And there is no date on that, is there?

A No.

Q Would you read the first sentence, please?

A "Clothing from a Chesapeake woman and her three-year-old daughter were taken for analysis to the FBI Crime Lab in Washington, D.C. on Tuesday, eight days after the bodies were found in a rural section of Deep Creek."

Q So this was published approximately when, ma'am?

A It says eight days after the bodies were found, [301] so about the third week.

Q Within two weeks after the bodies were found?

A Yes. Looks like it.

Q Let me ask you to read another couple of sentences from that article. Going down to the fifth paragraph in the article, the one that begins with two people.

A Yes.

Q Could you read that sentence?

A " 'Two people, including Lisa Sorrell's husband, Timothy, have been questioned by police and given lie detector tests,' Ziegler said."

Q The next sentence?

A "He said Timothy Sorrell was brought in for questioning last Thursday."

Q Thank you, ma'am. And that also is referring to the investigation of your daughter and granddaughter's death?

A Yes.

Q Thank you. Now, there has been mention in evidence of a life insurance policy on your daughter, Lisa Sorrell. To your knowledge, was there such a policy?

A Yes.

Q Could you tell Judge Spencer, please, how that [302] policy – who instigated that policy, how that policy came to be purchased?

A I originally called Prudential Insurance to get it set up. They had lost the policy and I found out that there was no insurance being carried on them. So I called and told them that we would help them with the payment of the money. And then the man, he originally met Lisa at my house, then they worked from there, went to Portsmouth, and talked with her husband.

Q And was that the only life insurance policy that you and your husband purchased for that?

A Yes.

Q Who did that cover?

A Lisa and Timothy.

Q It covered both of their lives?

A I think it was a family-type thing, yes.

Q Who was the beneficiary if Timothy were to die?

A If Shanta was living, probably went to the daughter. But I was not on there as a beneficiary.

Q Were both Timothy and Lisa employed?

A Yes.

Q And was that necessary in order to provide a home for your granddaughter and to support your granddaughter?

[303] A Yes, it was.

Q Now, ma'am, there has been some evidence introduced about statements that were attributed to you about what happened the evening that Lisa and Shanta disappeared and evidently were murdered. You have told the Court that you last saw them alive at approximately 4:45. When did you begin to miss Lisa? When did you begin to become concerned?

A It was an hour later.

Q And why did you become concerned then?

A She was supposed to go straight home. She was going home and she was going to call me when she got in.

Q When she left your house, where was it that she was going according to your understanding?

A To have the baby's picture taken with Santa Claus.

Q Where?

A Greenbriar Mall.

Q And you expected her to be at her home when?

A No later than 5:30 or quarter to 6, something like that.

Q And so you called her home and was there a response?

A No answer. No one.

[304] Q What did you do then?

A I kept dialing about every ten minutes, every five minutes.

Q Obviously there was no response?

A Up until 8 o'clock that evening or something.

Q And each time you called her home and there was no response, what effect did that have on your state of mind?

A Well, I knew something was wrong, because that wasn't like Lisa.

Q Do you remember approximately when the first time you heard from Timothy was after you had last seen Lisa?

A He called around twice. First one could have been around 6:30 in the afternoon, earlier, maybe just a few minutes earlier.

Q What did he say or what was the purpose of his call then?

A He asked me had I heard from Lisa.

Q And what did you say? Do you recall roughly what you said?

A I repeated that she had as far as I knew, she had gone to have the baby's picture made but should have been home by then.

Q And were you worried at that point about her?

[305] A Yes.

Q Would that have come through in your voice or in remarks that you made to Timothy?

A Yes.

MR. TURNER: I object to that. I don't think a witness can say whether something would come through to another person.

MR. McLEES: Well, Your Honor –

THE COURT: Overruled. Go ahead.

BY MR. McLEES:

Q When did you next hear from Timothy, approximately, if you remember?

A About 7:30 I got a second call.

Q And what did he ask at that time?

A Had I heard from Lisa still.

Q And what did you tell him?

A No.

Q And did he call subsequent times during the evening?

A The next call, I think, was after ten that night, around 10:30 or so. 10:15 to 10:30.

Q That was from Timothy again?

A Yes.

Q Did he ask for Lisa again?

A He asked was she over there at my house , and I [306] said, "No, she is not and I haven't heard from her."

Q Did you see Timothy that evening?

A Yes, I did.

Q What time did you see him?

A He got there about 15 minutes later. He was at my house about 10:30.

Q And what was his condition at that point?

A He came up on my steps and he was crying. And his he came into the living room and we went to the phone in the kitchen. I started talking about what had happened , "Where is Lisa?" And I asked him, I noticed his pants was wet but it was raining that day. It was drizzling like.

Q And did he stay at your house or did he leave?

A No. He left to go by then he decided we were going to check the area around the Greenbriar Mall to see if he saw the car. And so he left and went to Greenbriar to drive around and see if he could see the car.

Q When he did that did your husband stay with you or did he leave?

A My husband was almost out at the same time.

Q To do what?

A To go to the Greenbriar to see if he could see, too. They drove separate cars. My husband went in [307] his own car.

Q Did they return to your home?

A My husband came back.

Q Okay. Did Timothy –

A Timothy had come back, yes, because we all had left to go to his house.

Q What time roughly did they come back to your house?

A About ten minutes later. Greenbriar is two miles. It is very close.

Q That would have been what time?

A About quarter to eleven.

Q On the evening of December 5th?

A Right.

Q And then you went together to his house?

A We got in different cars and drove over to Portsmouth where they lived.

Q To Timothy and Lisa's house?

A Yes.

Q How long did you stay there?

A I was there in and out I was there all day. I didn't go back to my house for five days.

Q From 11 o'clock or so in the evening on December 5th until late the next day you were there?

A Yes, I was there a couple days.

[308] Q How long did Timothy stay there when you arrived there at approximately 11?

A How long he stayed at the house?

Q Yes, ma'am.

A Well, he stayed there. I don't remember him leaving to go anywhere else.

Q So at 12:40 in the morning of December 6th, where would he have been?

A He was in his house at 911 Taft Street in the den.

Q With whom?

A My husband and a couple other people and myself.

MR. McLEES: Your Honor, I have no further questions of this witness.

THE COURT: All right. Mr. Turner?

CROSS-EXAMINATION

BY MR. TURNER:

Q Good morning, Ms. Nixon. My name is Paul Turner. I represent Mr. Coleman Gray in this matter. I know this is an extremely painful subject for you and if at any point you want a break or anything, I'm going to try to move right along, but please ask Judge Spencer and I'm sure he will accommodate you.

[309] I take it Timothy Sorrell was well aware of the life insurance policy you mentioned earlier?

A He would have to be because he had to sign.

Q He had to sign to acquire the policy?

A Right.

Q So he was clearly aware that he was a beneficiary of that insurance policy?

A He was clearly aware – I think so.

Q When Timothy called – let me make sure I understand. He called, you thought, around 6:30 on December 5th?

A Yes.

Q Did he say where he was calling from?

A No. He did not.

Q Did you ask him?

A No, I did not.

Q I think you said he called again, I believe you said around 7:30.

A About 7:30.

Q Did he say at that point where he was calling from?

A No, he didn't.

Q Did you ask him?

A No, I did not.

Q Do you have any idea at this point where he was [310] calling from?

A I think I thought he was at a public telephone booth at the campus, at school.

Q Did you have any reason to think he was at a school?

A He went to school nights. He had night school. He was in night school, college.

Q This was Wednesday night, I believe, December 5th?

A Yes.

Q Would that have been a night that you would had expected him to be at school?

A Yes.

Q But you didn't ask him and he didn't say?

A No, I did not ask him.

Q Then I believe you said that he called again around –

A After the school sort of let out. After ten. It was after ten then.

Q So that's at least two-and-a-half hours since the previous call?

A Right.

Q Did that surprise you that such a time frame gone by before you heard from him again?

A Well, not really. I was thinking he was in [311] school. If you are in class, you can't get up and make calls unless you get a break or something.

Q If we assume hypothetically, just assume, that he was not at school, let's just assume that, I'm not asking you to say that, I'm just assuming that, that he was not at school and he had a telephone very accessible. Would you have been surprised that he would not have called for two-and-a-half hours in light of the events that you have outlined previously that were moving along?

A You say would I be surprised that he didn't contact us before?

Q Yes, ma'am.

A I'm not sure how to answer that. No, I wouldn't be surprised, because I thought he may have been yes, I would. Because if he called his house and he didn't get no answer, then my house would have been the next he called. But I was surprised that there was no connection between Lisa and the phone. She wasn't there.

Q Did anyone ever tell you subsequent to December 5th, 1984, that Timothy Sorrell was not at school that night? Did anyone ever tell that you?

A During the investigation, I found out.

Q Who told you?

[312] A The officer came to the house and questioned him. And I was there at the time. And we found out that day, I think, that he was not at night school.

Q Did you know where he was?

A They did say. They gave a girl's name, a lady's name, and the address. They asked him where was he. I don't remember her name. But evidently he gave as an alibi. I don't know what time he left there, though.

Q In light of that information that you obtained, was this a few days after the discovery of what had happened?

A This was approximately about one to two days while she was still missing.

Q That you received that information?

A Uh-huh. Yes.

Q Did that affect your reaction to – strike that. Did that in any way influence your feelings about what had happened on the evening of December 5th? That information?

A No, it didn't.

Q You mentioned that you found some wet jeans, I believe.

A He had them on when he got to my house that [313] night. I noticed they were wet that night when he came into the house. Then we left to go back to his house, and by the time his sister did some picking up and things and when the police came, they took the jeans and they were still wet then.

Q Did you tell the police about the jeans?

A No.

Q How did they get the jeans?

A I guess during like an – a search or something, they just went around and looked. I think they asked what did he have on that night and that sort of thing.

Q Did you ever discuss the jeans with the police?

A Yes, I was asked what he had on when he got to my house. And I said, "Jeans and a jacket and a shirt and a hat."

Q Did the police ever express to you at any time any significance that they attached to the jeans?

A No.

Q Did you ever say to them any significance that you might have attached to the jeans?

A No. Well, I could have said the jeans, I noticed the jeans was wet.

Q Did you feel that that was of some potential significance?

[314] A Two years later. Can I say why?

Q Certainly, sure.

A When they found the car, I went out there, and I noticed from the pictures the grass was up high around the car. And I was grasping for straws, trying to figure the thing out. So if you walked in grass, your pants or legs would have gotten wet. But he could have gotten rain on them, also.

Q Mrs. Nixon, I believe that at some point in time the in the fall of 1985, the Prudential Insurance Company filed a legal proceeding in Norfolk Federal Court. Are you generally aware of that?

A Yes.

Q There is a fancy legal term for it that even most of us lawyers don't even know what it means. It is called

interpleader, when you put money in Court when there is more than one party that says they deserve to get the money. Does that sound like what was filed and are you familiar with that?

A Yes.

MR. TURNER: If the witness could be shown the exhibit book, please.

(Exhibit book proffered to witness.)

BY MR. TURNER:

Q Before we get into the book, I take it there was [315] a point in time when you engaged the Sacks firm.

A Yes, I did.

Q And I believe your lawyer was Mr. I know Andrew Sacks is the son. Do you remember the name of the gentleman?

A It was a lady.

Q Would that be Sue Ellen Keefer?

A Yes.

Q Did you engage her directly to represent you with respect to the Prudential matter?

A Yes. I was trying to get the insurance company to hold the money.

Q Have you contacted the Prudential Company to indicate you felt you should get the money?

A No, I did not.

Q Do you know of anyone who had on your behalf contacted the insurance company?

A During the process of the five days, I think, that I was at the house, the insurance came up because it was due to be paid on. And I think he made a payment while I was there. I'm not sure how else the insurance came into the picture.

Q Do you know who would have been – who was the beneficiary of the policy under the very unfortunate circumstances that had occurred; do you know who [316] would have received or who was at least the apparent beneficiary of that policy?

A Timothy.

Q Timothy Sorrell?

A Yes.

Q Did there come a time when you even formed a personal opinion that Timothy Sorrell should not receive those proceeds from that insurance policy?

A Yes.

Q When was that, ma'am?

A Probably within a month after the death, while – think Prudential called us, and they had to – we met them at my house. They sent someone in from Florida, I think, and I forgot the gentleman's name. And I was asking questions. "Could the money wait until we found out what happened to them?"

Q Why did you feel that Timothy Sorrell should not immediately get the proceeds?

A Because of the way the investigation was going and he was a suspect to us.

Q Okay. When you say "to us," does that mean –

A My husband, myself, and the Chesapeake Police Department.

Q So all of you, your husband, yourself, and Chesapeake Police Department, you are saying, looked [317] upon Timothy Sorrell at that time as a suspect?

A I think the detective could say that I never looked at him as a suspect.

Q You personally never did?

A No, I never have looked at him as a suspect.

Q Were you in contact with the detective, Mr. Slezak?

A Yes, he worked on the case.

Q Did he look on him as a suspect?

A Well, yes, they did.

Q Did your husband look on him – your husband is Herbert Nixon?

A Yes.

Q Did he look on him as a suspect?

A Well, our opinion, I think, was that maybe he knew what happened. But I never thought that he actually did it.

Q When you say didn't actually pull the trigger –

A Pull the trigger, right. But I figured he knew what happened.

Q You thought Timothy Sorrell knew what happened?

A Yes.

Q Do you still think that today?

A Oh, yes, I do.

[318] Q You do?

A Yes, I do.

Q As I understand it, Sue Ellen Keefer was an attorney with the Sacks firm in Norfolk?

A That's right.

Q Andrew Sacks, and I'm drawing a blank. There is a senior Mr. Sacks whose name I can't think of. Do you know that gentleman?

A Yes.

Q That was the firm that was representing you, no question about that?

A Right.

Q Did anyone at some point suggest that you should file a pleading in the case we mentioned earlier saying that you – that Timothy should not receive the proceeds of the policy?

A The insurance company explained to us the procedure that they had to go through. They did want to give the money just to the beneficiary. And then they

asked and what would the next step be that we could do. That's when I hired them, the lawyer.

Q Ms. Keefer?

A Yes.

Q What did Ms. Keefer do at that point?

A She basically represented us. I did not go to [319] court myself. So I think she appeared before the judge and told him what we wanted, were trying to do about the beneficiary money.

Q Did you have a meeting with Ms. Keefer?

A Yes, we met a couple times.

Q Did Ms. Keefer ask you if you knew about the Sorrell murders, the unfortunate time?

A We discussed what was happening as far as up to that point. We didn't get into any specifics or anything, just that basically her interest was the insurance money.

Q Did you share with her the information you had up to that point, with your lawyer?

A We shared with her about the money and the insurance, that she knew how the policy originated and that type of thing. And she also, I think, knew that Timothy Sorrell was being looked at as a suspect.

Q Did you share with her that you had been in touch with Detective Slezak?

A I don't remember telling her. I couldn't say.

Q By the way, did you have contact with any other police officers from Chesapeake or any other jurisdiction in your area with respect to this matter?

[320] A I think there was a Detective Peters that with them, had worked on it. He was the first one. I had met Detective Slezak then. We met a Detective Pierce that came over and took like I guess you would say a report. And I have forgotten, Detective Slezak had a partner. We called him Buddy, but I forgot last name.

Q Could it be Harrison?

A Yes, I think it is. And I think that was the three. Captain Ziegler, at the time, we met with him a couple, few times. So I think that was all of them.

Q Did you review a legal document that was filed on your behalf in the case? I would direct your attention to the Tab 1 and a Tab 2. Focusing on Tab 1, Mrs. Nixon, if you would go back about to the sixth page. Pass by the first five pages, which I won't get into at this point. Go to the sixth page. You will see a document that's titled "Answer." should be under Exhibit 1. It should be the sixth page back from the beginning. Maybe it is the fifth page. But there are two documents that are Exhibit 1. A document called a Complaint, and then right behind it is a document called an Answer. Do you that there?

[321] A I've got it.

Q Take a look at that document. Do you have any recollection of seeing the document? On the third page, you will see that it purports to be signed by someone on behalf of the Sacks firm, and I believe that's Stanley

Sacks. That's the gentleman I couldn't think of. Have you seen that document, ma'am?

A You say signed by him?

Q Yes. It looks like. It appears to be Mr. Sacks' signature on the third page.

A I'm not sure. Yes, it would have to be because that's who we met with the first time.

Q Mr. Stanley Sacks?

A Yes, we did.

Q I'll represent to you as an Officer of the Court, this purports to be an answer filed on your behalf, on behalf of Herbert L. Nixon and Brenda J. Nixon. Are you Brenda J. Nixon?

A Yes.

Q Have you ever seen this document before?

A Yes.

Q If you would look at paragraph five first, ma'am, it is the second page. paragraph five. And if I could just read it to you and just ask you a [322] question or two about it. It says: "Timothy Sorrell is not entitled to receive the proceeds of the insurance policy because on information and belief, he caused the death of Lisa Sorrell and is currently under investigation by the Chesapeake Police Department."

Do you recall that statement being made in this document?

A To be honest, I don't think I read this whole thing all the way through. But those were some of the things that we said.

Q Do you have any reason to believe that that statement was untrue when it was made?

A No.

Q In paragraph six, ma'am, right below five, if I could just read it to you. It says: "It is anticipated that an indictment will be issued for Timothy Sorrell for the murder of Lisa Sorrell in the very near future, and that Timothy Sorrell will be convicted of the murder of Lisa Sorrell." Do you see that, ma'am?

A Yes, I do.

Q Do you have any reason to believe that that statement was not true when made?

A I still wouldn't believe that until I had some [323] more evidence of what was going on.

Q So you personally had some doubt about that?

A Yes, I always had doubt.

Q On the third page of the document, ma'am, just for the record, I believe you will see that there is a certificate of service that is dated the 27th day of November, 1985. Do you see that, ma'am?

A Yes, I do.

Q Do you have any reason to believe that this document was not filed on or about that day, 27 November, 1985?

A No.

Q Did your attorneys, were your attorneys authorized to file this document on your behalf?

A Yes.

Q I would represent to you, and I won't waste anybody's time, but there is a companion document. There were two – it is a technical thing. There were two cases filed. There is a companion document essentially identical to this one. I won't waste your time going through that. Do you remember that for some reason two cases were filed? I don't know whether you got into that kind of detail or not.

A I got a set of papers and my husband got a set?

Q There was a case filed with reference to monies [324] that would have been available on the life of Lisa and there was a separate case filed with respect to Shanta.

A Yes, there was.

Q You remember that.

A Yes.

Q Yes, ma'am.

Do you recall when Detective Slezak first entered the picture, so to speak? How much after the unfortunate events occurred was that?

A Within that week we met with him.

Q Did you have very close contact with Detective Slezak from that point forward?

A Yes, I did.

Q Just approximately, how often would he call you?

A I think I would call him more. I'm sure I was on the phone a couple – every other day or so trying to see if they had heard anything.

Q Did that go on for a long period of time?

A I would say one year, I think.

Q You think you had close contact with Detective Slezak for at least one year?

A Yes.

Q And that would be one year from –

[325] A From December – after the 15th of December.

Q After the 15th of December, 1984?

A Yes.

Q You had close contact with Detective Slezak at least until a year from that date?

A Right.

Q By close contact, we are talking about these more than one phone call per week, either you to the detective or I assume him returning your call?

A Right, he would return the call.

Q Do you feel that he kept you fully informed of the investigation from his perspective?

A No.

Q You don't?

A No. I figured it was something the police did that they couldn't tell me.

Q Did he keep you substantially informed?

A Yes, he did.

Q Did you keep him informed at least of anything that you felt, knew, whatever about the case?

A Yes.

Q Do you feel you shared very openly with him any of your feelings about the case?

A I think so. Yes, I would say so.

Q How about your husband; was he involved by your [326] side all the way on this or did he do anything independently?

A No, he did not.

Q Would it be normal that he would have been with you whenever the matter was discussed at any meeting or anything?

A Yes, he would have, most of the time, I think. If there was a meeting, we would have been together mostly.

Q When you were on the phone, unless you had a conference phone, I assume it was either you on the phone –

A Just me most of the time. I did most of the calling.

Q Did Detective Slezak come to your house on occasion?

A During the investigation, the first week, I think, we left Lisa's house to meet them at our house in Chesapeake. No, he was not there. I don't think it was that often he was at my house. He came to look at something pertaining to pictures, that type of thing. But I don't know how often it was. That wasn't regular.

Q What is your relationship, if any, with Timothy Sorrell at this time, ma'am?

[327] A There is no relationship.

Q No relationship?

A No. I tried, but – but I didn't get it from the other side.

MR. TURNER: That's all I have. Thank you very much.

THE COURT: Anything else?

REDIRECT EXAMINATION

BY MR. McLEES:

Q With respect to Mr. Sorrell, Timothy Sorrell's jeans being wet that evening, what was the weather that evening?

A Misty rain.

Q It was raining?

A Yes.

Q Mr. Turner directed your attention to paragraph five of your answer in that lawsuit where it says, "Upon

information and belief, Timothy Sorrell is responsible for the decedent's death." Do you remember that paragraph?

A Yes, I do.

Q That was essentially meaning that you had received information and as a result of that, you believed that he was responsible for the young lady's death; is that correct?

[328] A I think in the process of this, I found out, when I say responsible, I still say I didn't never believe he actually was the one that pulled the trigger, because I didn't see no marriage problems and they got along, that sort of thing, as far as I saw. But I always had suspicion of he knew why it happened.

Q So you thought he knew why it happened?

A Yes, I do.

Q Now, the information upon which those beliefs are based, is that the information you have disclosed to Judge Spencer here today or is there other information additionally?

A I think I took my information from being with Timothy for those five days we stayed at the house, things that I didn't know about that was going on, and the way he acted. Things that was said to me personally.

Q Is there anything in specific that you could tell the Judge?

A His emotions. It was like – he made a comment on the telephone, "Don't hurt her. She won't do you no harm." Something in reference to that.

Q When did he make that?

A There was a television – during the week [329] while they was missing, we tried to put it on the local news. They interviewed us at Timothy and Lisa's house. And it was like an appeal made, if anybody knew anything about the whereabouts of Lisa and Shanta, would they let us know. Would they call the police department. And that was one of the things that Timothy said. And I still did not, you know, I didn't focus on it right then. It took me sometime later to go back and look at that interview and why did he say that? Also, he didn't want me – being alone, he didn't like being alone. It looked like he was suspicious.

Q Who did he spend time with?

A With my husband, myself, his mother, and sister. There was always someone with him.

Q Was there anything else specific that you can think of that constituted some of the information you based this belief on?

A Not legally. Just a mother's feeling.

Q Your gut feeling that there was something that you didn't know about?

A My main thing is why was he crying when he walked up my steps at 10:30 at night. It just dawned on me he didn't know – supposedly had not known what was happening or where Lisa was, but he was [330] crying and that bothered me.

Q Did you know at that point what had happened?

A No, I did not. I wasn't crying.

Q Were you upset at that time?

A I was very upset, because that wasn't Lisa's pattern.

Q Was there anything else specific?

A Well, later I found out that drugs and things was going on that Timothy probably was involved with.

Q Timothy was involved in drugs?

A I don't think it was ever – I don't think evidence came out. Nothing like that. But he was with a lot of drug people – let's put it that way – that we personally knew of; they was involved with drugs.

Q He associated with people who were involved with drugs?

A Yes. I think his brother was doing drugs. That was a known fact.

Q How did you know that?

A Lisa had said something earlier to me, then Chesapeake also said something. A young lady came his house that was a drug user to get drugs from Timothy, from his brother.

[331] Q And was there anything, any information that you knew of that tied that to Lisa's death? Any connection between that and Lisa's death that you can explain to the Judge?

A Not that I know of.

Q Anything else, ma'am?

A No.

MR. McLEES: Thank you.

MR. TURNER: Your Honor, I left out one or two small points.

THE COURT: Go ahead.

MR. TURNER: Your Honor, one technical point. Mr. McLees went over a newspaper article with the witness which he had introduced as Respondent's Exhibit P-2. It is just the first page of the article. I have the second page of the article. I'm sure Mr. McLees does. There is just one sentence in there that I would like to get in the record which is not attached to the first page.

MR. McLEES: I would be happy if he wants to put the whole thing in or the sentence, whatever.

THE COURT: Go ahead.

RECROSS-EXAMINATION

MR. TURNER: I can show this to you and we can do this through the witness.

[332] (Document proffered to witness.)

BY MR. TURNER:

Q Ms. Nixon, I've handed you an article which was previously introduced, the first page of which was previously introduced as Respondent's Exhibit P-2 and you had read a portion of that into the record from page one. I am now showing you page two of that article. Would you please read that paragraph that I just pointed to?

A "Meanwhile, the Nixon attorney, Sacks, said he plans to renew his attempt to convince the Court that the Nixons deserve the insurance money."

Q I'll show you the first page that you looked at. Would you state for the record the date of that article?

A The date?

Q Yes, ma'am.

A January 7th, 1986.

Q Thank you. That's all I have on that one. Just one other question, ma'am. In your discussions with Detective Slezak, did anything ever come up about the Naval Supply Center or Naval Exchange concerning the events that had occurred?

A Yes, it did.

Q What was that, ma'am?

[333] A Something about things that was stolen from the exchange.

Q Did that have anything to do with either Timothy Sorrell or your daughter?

A Nothing to do with my daughter. Timothy worked in the same building that this was going on.

Q Did either Detective Slezak or you suggest that Timothy could have been involved in that?

A I did.

Q You did?

A Yes.

Q What did you say about that to Detective Slezak?

A I recalled a conversation that I had with my daughter that some people had been to her house with little radios or tapes, things of that nature. Then I asked him could they check it and see what was going on; that I thought the stuff was stolen from the Navy Exchange. And when I got to Lisa and Timothy's house that night, I saw this little radio that I didn't recognize. And I'm not saying I'm supposed to recognize everything that went on at their house, but I saw a radio. And when the detective came I asked him to check it; that I saw Timothy give some things to his uncle and I wanted to [334] know what it was. And I gave him the uncle's name and they came to the house and they did check and I think they found out that it was stolen merchandise.

Q Prior to her death, did your daughter, Lisa, ever indicate anything, any concern to you about Naval Exchange matter that you have just recited?

A She didn't tell me Navy Exchange. She mentioned a gentleman, a man, someone that Tim knew that worked with him or something that was at the house and she called me up to tell me what was going on. She said, "Mom, there is a man here with some things, and Tim –" I told her to "Tell Tim to tell him to take them out of your house."

Q Was your daughter concerned about the situation?

A Yes. Well, at that phone call, there was a concern, yes.

Q Do you know if she expressed that concern to her husband, Timothy Sorrell?

A No, I don't know.

MR. TURNER: Thank you, ma'am. That's all I have.

THE COURT: You may stand down, ma'am. Thank you very much.

* * *

In the United States District Court for the
Eastern District of Virginia

[Caption Omitted In Printing]

[342] DIRECT EXAMINATION

BY MR. McLEES:

Q You are Detective Michael Slezak who testified yesterday?

A Yes, sir.

Q Let me ask the Marshal to show you a photograph, a copy of which has been admitted as Respondent's Exhibit E of the two young ladies.

A E?

Q Yes. Have you ever seen those young ladies before?

A Yes. It is Lisa and Shanta Sorrell.

Q When did you first see them, Detective?

A December 10th, 1984.

Q And where was that?

A On Cook's Mill Road.

Q And when you arrived at the scene, what did you find when you first saw them?

A The car was – the windows of the car were covered over with soot. We later found there to be soot on the inside.

[343] Q Where were these young ladies with respect to the car?

A Ms. Sorrell, Lisa Sorrell, the adult, was in the front passenger's seat of the right-hand side of the car.

Q The passenger's seat?

A Yes. And Shanta was in the trunk of the car.

Q What was their condition?

A They were both dead.

Q Were you present at their autopsies?

A Yes.

Q Conducted by whom, sir?

A Dr. Pressawalla.

Q In your testimony yesterday, you described the door handle of the car being sprayed over with paint?

A Yes, sir.

Q You described the fire being set with paper and matches and apparently no accelerants.

A Yes, sir.

Q In examining the car and the scene of the crime, were there any other circumstances that you would characterize as indications that the crime had been hastily committed?

A The victims' jewelry, some of her jewelry and [344] necklace, was still on her. I believe there were some gold earrings, a small amount of money in her purse. There was a postal money order for, I believe, $280 in the vehicle.

Q Those things had not been taken?

A No. They were not taken.

MR. McLEES: I have nothing further at this point, Your Honor.

THE COURT: All right.

Detective Slezak, that's the kind of stuff that normally indicates that robbery was not a motive?

THE WITNESS: Well, if nothing was taken, it would, yes, sir.

THE COURT: Mr. Turner?

MR. LEE: I have a question.

CROSS-EXAMINATION

BY MR. LEE:

Q I just have a few questions for you, Detective. Today you have described some of the evidence that you found at the Sorrell scene and yesterday you described evidence found at the Sorrell scene – evidence found at the McClelland scene. You noted some similarities, but you noted many dissimilarities, also. But you explained that that might be an indication that these crimes were [345] committed by a common perpetrator who learned from his first crime how better to commit a second crime Is that right?

A I think that would be a fair summary.

Q Isn't it fair to say that an equally likely explanation, if not a better one, is that these crimes were committed by two different people?

A No, I don't think so.

Q Okay. One other thing that I just want to get clear. Are you certain that at no time after the Coleman Gray trial that you made statements to either Mr. Nixon or Mrs. Nixon or their lawyer that Timothy Sorrell remained a suspect in the Sorrell murders?

A I can't imagine me saying that. There was not a time that I thought – after I saw the photographs of the McClelland murder, there isn't a time that I felt that Mr. Sorrell was responsible for their murder.

Q So as far as you are concerned, all you needed was to compare those two sets of photographs to make the decision.

A No, that's not what I said.

Q Okay.

A I said from the time I saw the photographs, the similarities in those two indicated to me that Mr. Gray was involved. We pursued it, and I am still of [346] that opinion.

MR. LEE: I don't have any further questions.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. McLEES:

Q Detective Slezak, when you were investigating this crime, what information, if any, did you have with respect to where Lisa Sorrell was going when she left the Nixon's home?

MR. LEE: This is completely outside the scope of cross.

MR. McLEES: It is in response to Your Honor's question, which was after my direct examination.

THE COURT: Go ahead.

THE WITNESS: My understanding was that they were going to Greenbriar Mall. One of the purposes was to have a photograph taken of Shanta Sorrell with Santa Claus.

BY MR. McLEES:

Q All right. Did you have information about how much money they had on them?

A That was never determined. There was some indication that they were going to have a picture [347] taken and do some shopping, but I do not know how much money she was supposed to have.

Q Was there information about the purchase of the money order?

A Pardon me?

Q Do you remember receiving any information about her purchasing the money order?

A I remember a discussion about a money order. And I know that there was a money order in her car that we found.

Q So were you ever able to determine how much money she had had on her person before she was accosted by whoever it was?

A No.

MR. McLEES: Thank you.

THE COURT: All right. You may stand down. Detective Slezak, did you all determine whether or not she actually had the picture taken? Is there any record of her getting to Santa Claus and getting a picture taken?

THE WITNESS: There was no physical evidence that would establish that. There was an individual that we talked to who expressed an opinion about it.

THE COURT: All right. Fine. Thank you.

* * *

In the United States District Court for the
Eastern District of Virginia

[Caption Omitted In Printing]

[395] MICHAEL SLEZAK,

recalled as a witness by and on behalf of the Respondent, having been first duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McLEES:

Q You are Detective Slezak who has become familiar to us by now in this case?

A Yes, sir.

Q Detective, with respect to information that Timothy Sorrell gave you about his whereabouts on the [396] evening of December 5th?

A Who?

Q Timothy Sorrell. Information that you obtained from other people about his whereabouts and information he gave you about his whereabouts on the evening of December 5th, 1984.

A Yes, sir.

Q Did you investigate that information to see if you could verify it or not verify it?

A Yes.

Q What were the results of your investigation as far as you could construct, reconstruct his whereabouts from what you were given?

A We spent some time trying to determine if an individual had taken a test, I believe at the technical center, part of Tidewater Community College. I believe that Mr. Sorrell said that he had given this individual a ride there. We attempted to find out whether that person took the test. Then Mr. Sorrell said that he went to see Deborah Robinson, who lived in Robin Hood Apartments in the City of Norfolk.

Q Was that the period of time when he normally went to community college or when his class was scheduled but he was at her house?

[397] A Yes. I believe so.

Q And did you contact her?

A Yes, I did.

Q What did you learn from her?

A She said that he was there during that time frame.

Q Did you have any indication that there was an affair or romantic relationship between Timothy Sorrell and Ms. Robinson?

A It had crossed my mind, but Deborah Robinson's husband or boyfriend was present during the interview and he was aware that he had been there.

Q Was he aware that Timothy Sorrell had been there that night?

A I'm not certain about that. I think that he knew, but I can't say with absolute certainty that he knew that night. Certainly he knew when we were there to talk to her.

Q He knew that Timothy had been there when you talked with him?

A Yes.

Q Was there any uneasiness between them about that?

A There didn't appear to be.

Q Did you have, after talking to them, did you [398] have any reason to believe that there was an illicit relationship between Timothy Sorrell and Ms. Robinson?

A I don't recall thinking that. I was curious about him being there that evening, but – I had wondered if her statement to us was the truth. To say that I was satisfied that that was the truth, I would have to say that I was not satisfied with that at that time. I have never found anything that contradicted what she told me.

Q Okay. Did you have any information about Timothy Sorrell's whereabouts earlier in the evening?

A Mrs. Nixon and Mr. Nixon, I believe they told me that he had been at his mother's, that Mr. Sorrell had been at his mother's house that afternoon, earlier that afternoon.

Q What time period was he at his mother's?

A Before 5 o'clock.

Q And from 4:30 to 7, did you have information about where he was?

A My understanding is that he was there, and then took a cousin or a friend, I think his name was Curtis, to either the technical center or to Tidewater Community College. They are across the [399] street.

Q At 7 o'clock for the class?

A That's my understanding.

Q Now, where did Mrs. Nixon get the information that Timothy had been with his mother?

A I think she got it from Mr. Sorrell.

Q Do you know if she spoke to his family?

A Oh, I feel certain she did. That was one of the reasons we communicated, that Mrs. Nixon and I communicated as often as we did, so that I would know what she knew. And she was communicating with members of – with Mr. Sorrell's family.

Q Now, let me switch your attention to the subject of these .32 caliber handguns. It has been mentioned that a .32 weapon was involved in this case. In your experience, are .32 caliber handguns frequently used in crimes in the Tidewater area?

A They have been. Yes.

Q Why? Do you have any opinions why?

A For the most part, .32 caliber guns are inexpensive. We have referred to them as rip guns. They are not accurate, because they are so cheap. If you are not going

to be at close range or stick it in someone's rib, it is not a very good weapon to use.

Q Now, what other common types of calibers of [400] handguns are there in circulation?

A What other calibers?

Q Yes, sir.

A You will find practically – well, you find .22's, .25's, .32's, .38's, .357's, 9mm's, .40 caliber now, .41 calibers, which are fairly unusual the .45's and .44's.

Q With respect to those handguns of larger caliber that you have mentioned, .38's, .40's, 9mm's, .357's et cetera, are they more powerful than a .32?

A Yes, generally speaking they are.

Q Is that an advantage in committing a crime of violence?

A A high-powered gun?

Q Yes, sir.

A Depending on the circumstances.

Q What about the circumstance where a person has method of operation of firing repeated shots into a helpless victim's head at very close range, from inches away?

A A high-powered gun wouldn't be an advantage, no.

Q Would it be any disadvantage?

A It would if you didn't want someone to hear it; it would be a disadvantage. If you were in a [401] situation

where the penetration of the bullet would affect – would have some effect inside a building where it would penetrate the victim and then into a wall, it would be.

Q What do you mean by "penetration"? You mean a high-powered – a bullet from a higher-powered gun is more likely to go through the victim?

A Yes.

Q What happens when it goes through the victim?

A A high-powered projectile would have a tendency to come out.

Q And do what?

A And do additional damage to whatever is around or yourself, or a ricochet, any number of things.

Q They could ricochet and hurt the shooter?

A Yes.

Q Or people with him?

A Certainly.

Q What about if they stuck in a wall or seat of a car or something at the scene of a crime. What would they provide?

A They would provide evidence that would trace the projectile to the victim's serology or DNA. They would also, if you could then match that projectile to the firearm –

[402] Q It would fix where the person was actually shot?

A Yes.

Q Now, are larger caliber handguns generally same size as smaller ones or are they on larger frames?

A Generally speaking, they are on larger frames, but not always. There are some match pistols that, even though they are small caliber, they are on larger frames for added accuracy and operation; the grip, that sort of thing.

Q Would it be fair to assume a gun on a larger frame is more difficult to conceal about one's person?

A Certainly.

Q What about a .22 caliber handgun. You mentioned that's common. That's smaller than .32.

A Yes.

Q Would that – how would that compare with a .32 in penetration power?

A A standard .22 has a higher probability of ricocheting because it has such a high velocity, although the bullet is smaller. It has a long range. But it has a smaller mass, and would have a greater likelihood of ricocheting.

[403] Q Okay. Now, let's suppose that a criminal was perennially in need of cash, wanted to rob and shoot victims in the head at close range, wanted to throw the weapons away, get rid of the weapons as soon as he could afterwards so he wasn't caught with a murder weapon on in his possession, places like water treatment plants or places of that nature so they couldn't be traced to him, what kind of handgun might he logically choose for those purposes?

A A .32 or a .38. They are generally the cheapest.

Q Now let me direct your attention to and ask the Marshal to show you what I think is Petitioner's Exhibit 4, which is the blown-up map.

MR. McLEES: Can I ask the witness to come down and perhaps we can hold the map so Your Honor can see it?

THE COURT: Sure.

(Map displayed.)

BY MR. McLEES:

Q Do you recognize this map? Take a minute to get your orientation.

A Okay, give me just a moment.

Q Certainly.

(Witness perusing document.)

[404] Okay, it appears to be Interstate 64 in Chesapeake, originating a couple miles from Mower's Hill and terminating past the Greenbriar Mall exit near the City of Virginia Beach.

Q Would you just point to the Greenbriar Mall location for His Honor, where Lisa Sorrell disappeared?

A Right over here.

Q And can you locate and point to, for His Honor, to the Deep Creek area where the Sorrell bodies were found in the automobile?

A Right at the end of Cook's Mill Road.

Q And what is the highway that appears to run past them through this section of map?

A Interstate 64. There is an exit here.

Q Now, in relation to what's shown on this map, can you tell His Honor where the Murphy's Mart in Churchland is located, where Mr. McClelland worked and where Ms. Hinkle worked, and Melinda Gray?

A It is not on this map.

Q Where is it in relation to what's shown on this map?

A Well, I'm estimating. The size of the map sort of throws me off. But it would be over in this area.

[405] Q As you are looking at it, to the northwest of what's shown on this map?

A Yes.

Q Okay. Have you driven from the Murphy's Mart in Churchland to Greenbriar Mall and back for the purpose of timing that trip?

A I drove from Murphy's Mart to Greenbriar Mall, and then the return trip, of course, is the same distance.

Q What route did you follow, sir?

A Murphy's Mart sets about a distance of two city blocks from Route 17. It sets back. I drove through the parking lot onto Route 17 and then took Route 17 into the city, or continued into the City of Portsmouth, to Interstate 264. Interstate 264 comes out in this area and then makes a junction with 64 here and then drove 64 out to the mall.

Q And you followed 64 throughout the length of it that's shown on this map?

A Yes, sir. Until I exited onto Greenbriar Parkway, which is right at the mall.

Q And how long did that trip take you?

A 23 minutes, using a digital clock.

Q And of course going and coming, going by 64, you are going right by the Deep Creek area?

[406] A Yes, sir. There is an exit there for it.

Q How far after 64 was the car found, was the Sorrell's car found?

A I would say a mile-and-a-quarter to a mile-and-a-half.

THE COURT: What time of day did you drive it?

THE WITNESS: I believe I started at 2:58.

BY MR. McLEES:

Q What day of the week was that?

A It was a Wednesday in light rain.

Q And of course on the interstate, you are not impeded by traffic lights or traffic jams?

A No, sir.

Q And in fact, if one were at Greenbriar Mall and wanted to get back to Murphy's Mart in Churchland as quickly as they could, what route might they follow?

A If mileage – I'm not certain that this is the shortest route back to Murphy's Mart. If I were going to make the drive to get back, if I was personally trying to get back as quick as I could I would take this route because there is little to impede me. There are other routes that you could take to get there. And if they are quicker, I'm not certain. But certainly there are no traffic lights [407] along the interstate, which would take you back to this area.

Q And if you wanted to make that trip in a hurry and particularly if you wanted to stop and make a shorter stop in the Deep Creek area and get someone back to work in time that they wouldn't be missed, is that a likely or an unlikely route to follow?

A It would be a likely route to follow.

MR. McLEES: That's all the questions I have with respect to the map. You may resume the witness stand.

BY MR. McLEES:

Q Do you know from your conversations with Mr. Gray whether he has been in the Cavalier neighborhood in the Deep Creek location near where the –

A He has been to the Cavalier area.

Q On what occasions?

A He told me he was married there at the community center. And he has a relative that lives in Cavalier. And I believe his wife's family lives in Cavalier Manor.

MR. McLEES: Thank you, sir. I have no further questions.

THE COURT: Any cross?

CROSS-EXAMINATION

[408] BY MR. LEE:

Q Detective, how long did it take you to drive this entire route from Murphy's to Greenbriar, Greenbriar to Cook's Mill, Cook's Mill back to Murphy's?

A As I stated, I only drove it in one direction. It is the same distance heading east as it is west. I didn't make a round-trip.

Q So you drove Murphy's to Greenbriar and Greenbriar to Cook's Mill?

A No, sir.

Q You just drove Murphy's to Greenbriar Mall?

A That is correct. On that occasion. Yes.

Q And it took you 23 minutes?

A Yes.

Q At 2:30 or so in the afternoon?

A No, I left at – I believe it was just before 3 o'clock, and it took 23 minutes. I didn't use a stopwatch. I used a digital clock on the dashboard. So that's accurate within a minute and 59 seconds.

Q What was the purpose of doing this? Why did you do this?

A To see how long it took to get there.

Q Do you ever time the distance from Greenbriar to Cook's Mill?

[409] A No.

Q You never did?

A No.

Q Okay. What about Cook's Mill back to Murphy's Mart?

A No.

Q Okay. And you are not sure if the route you took is the shortest route?

A I believe it is the shortest as far as travel time is concerned. There may be one shorter. It wouldn't – if someone was to ask me what would be the quickest way, then I would pick that because of delays. There is an alternate route and I suppose if you were fortunate enough to catch the bridges down and took the lights just right, you may be able to get there quicker. It is what I believe to be a longer distance, but a quicker route.

Q Did you ever time this route at rush hour?

A I'm sorry.

Q Did you ever time this route at rush hour?

A Which rush hour?

Q Well, let's say between 4:30 and 5:30 in the afternoon?

A No, I timed it that day as it was raining. There was a light rain, and it was on a Wednesday. [410] It was a Wednesday in the rain and I timed it at that.

Q Do you know where Timothy Sorrell was from 4:30 to 5:29 on December 5th, 1985?

A No.

Q Yet you eliminated him as a suspect eventually?

A Well, his whereabouts isn't the only thing that I considered, but there was a time that I personally eliminated him as a suspect, yes, sir.

Q Even though you don't know where he was from 4:30 to 5:29 that night.

A From what time?

Q 4:30 to 5:29 on the evening?

A Yes, sir.

MR. LEE: Thank you.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

COLEMAN WAYNE GRAY, Petitioner,	)	
v.	)	Civil Action No. 3:91CV693
CHARLES E. THOMPSON, Respondent.	)	

MEMORANDUM OPINION

(Filed Aug. 25, 1994)

THIS MATTER is before the Court on petitioner Coleman Wayne Gray's application for habeas corpus relief, pursuant to 28 U.S.C. § 2254. Mr. Gray challenges his December 5, 1985 conviction and subsequent sentencing by the Circuit Court of the City of Suffolk, Virginia, for capital murder.[1]

On May 26, 1993, the Court issued a Memorandum Opinion which granted in part, and denied in part, the Petitioner's Motion to Alter or Amend Judgment. An evidentiary hearing was ordered on one claim: whether the introduction of evidence pertaining to the Sorrell murders during the penalty phase of Gray's trial violated

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[1] Mr. Gray also was convicted of Use of a Firearm in the Commission of Murder. He was sentenced to four (4) years imprisonment on this charge.

The claim of error addressed in this Memorandum Opinion relates only to Gray's capital murder charge, and does not affect his other conviction.

the Petitioner's Fourteenth Amendment right to due process.

The parties filed briefs on this issue, and the Court held an evidentiary hearing on April 21-22, 1994. The case now is ripe for adjudication.

I.

The facts surrounding the crimes for which petitioner Gray was convicted are set forth in the Supreme Court of Virginia's opinion on direct review, *Gray v. Commonwealth*, 233 Va. 313, 356 S.E.2d 157, *cert. denied* 484 U.S. 873 (1987), and in this Court's April 1, 1993 Memorandum Opinion. The salient details may be summarized as follows:

Richard McClelland, the manager of a Murphy's Mart Store in Portsmouth, Virginia, worked from 10:00 a.m. into the evening on May 2, 1985. That night at approximately 9:30 p.m., Coleman Gray and Melvin Tucker parked outside the convenience store. Both were "high" from "free basing" cocaine, and they watched McClelland and a security guard work for a significant period of time.

Shortly before midnight, McClelland and the security guard left the store. Each man got into his own automobile, and both drove to a nearby fast-food restaurant. Gray and Tucker followed the men to the estaurant. McClelland walked inside the establishment to eat; the security guard proceeded to the "drive thru" and picked up his food.

After finishing, McClelland returned to his car, and began driving towards Smithfield, Virginia. Gray and Tucker resumed their pursuit. At a stop sign on the corner of Nansemond Parkway and Bennett's Pasture Road, Gray pulled his car in front of McClelland's and blocked the roadway. Gray, who was brandishing a .32 caliber revolver, forced McClelland out of his car, into Gray's car, and took the victim's wallet. Gray and Tucker then drove McClelland back to the Murphy's Mart Store.

Upon arrival, Gray forced McClelland to open the store. Tucker remained in Gray's car. The two men inside the store opened the safe and filled three bags full of money. After transferring the cash to Gray's car, the men forced McClelland back into the automobile.

Gray then drove to a service station to fill up his car with gasoline. The Petitioner also filled up a gas can which he placed in the trunk of his car. After paying for these purchases, Gray drove to the Frederick Campus of Tidewater Community College. The Petitioner turned onto a side road near the college, and ordered McClelland out of the car. The store manager walked fifteen to twenty feet away from the car, and, pursuant to Gray's order, laid face down on the ground. McClelland begged Gray not to shoot him or harm him in any way. After reassuring McClelland, Gray fired six shots in rapid succession into McClelland's head.

Gray and Tucker then returned to the intersection where McClelland's car was located. In order to destroy this evidence, Gray took the can of gasoline out of his trunk, and covered McClelland's car. After igniting the

fire, the pair returned to Gray's apartment to count the money they had stolen.

Several days later, Tucker took Gray to the Nansemond Treatment Plant, where he worked. Gray threw the revolver he had used to kill McClelland into a contact tank. (Gray later showed the police where he had discarded the evidence and the gun was recovered.)

The police discovered McClelland's body only a few hours after the grisly murder. The autopsy revealed that six close-range .32 caliber gunshot wounds to the head had caused McClelland's death. Coleman Gray and Melvin Tucker were arrested and indicted for the capital murder of Richard McClelland. Judge Godwin, the senior Circuit Court Judge of Suffolk County, appointed Mr. James Moore and Mr. Ward Eason to represent the Petitioner.

Prior to the commencement of the Defendants' trial, Gray's attorneys moved for the appointment of an investigator to help them fully and adequately prepare the Petitioner's defense. These motions were denied by the general district court and by the circuit court. *See* Pet. Ex. 13 & 14. In November, 1985 Gray also filed a pre-trial discovery motion, which sought the disclosure of all exculpatory evidence. *See* Pet. Ex. 12. Pursuant to the court's order granting this motion, Commonwealth's Attorney Philip Ferguson met with Gray's counsel in the police station, and allowed the defense attorneys to examine all of the physical evidence collected concerning the McClelland murders.[2] *Tr. of 4/21/94* at 76-77.

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[2] None of the Sorrell murder evidence was available for examination.

Perhaps the most critical factual issue in the McClelland murder trial concerned who pulled the trigger. *Id.* at 73. There was no physical evidence to prove which defendant shot and killed McClelland, and each man claimed that the other had committed the murder.

Before the trial commenced, the Commonwealth's Attorney entered into a plea bargain with Melvin Tucker. *See* Pet. Ex. 8. In exchange for Tucker's testimony against his co-defendant, the Commonwealth agreed to try Gray on a capital murder charge, and to prosecute Tucker only for first-degree murder.[3]

On December 2, 1985, the trial of Gray and Tucker began. This proceeding was Commonwealth's Attorney Ferguson's first capital murder trial. *Tr. of 4/21/94* at 206. At the outset of the proceeding, Mr. Moore, one of Gray's attorneys, asked the Court to order the Commonwealth's Attorney to reveal what the evidence would be introduced at the penalty phase if defendant Gray was found guilty. *Jt. App. Vol. 1* at 278. Moore based his request on *Peterson v. Commonwealth*, 225 Va. 289, 297, 302 S.E.2d 520, 526 (1983), which established that the fair and preferred practice in capital murder trials is for the Commonwealth's Attorney to reveal the evidence to be presented at the penalty phase prior to the trial. Mr. Ferguson stated he intended to introduce evidence of *statements* Coleman Gray had made about other crimes he had committed. *Jt. App. Vol. 1* at 279. The following conversation transpired:

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[3] Philip Ferguson testified at the April 21, 1994 hearing that he didn't believe Melvin Tucker ever had been charged with capital murder. *Tr. of 4/21/94* at 243. However, petitioner's Exhibit 8 clearly demonstrates that Tucker was arrested and originally faced a capital murder charge. *Id.* at 248.

Mr. Moore: Your Honor, this is my concern. We will probably at the very best stop in the middle of the day or late in the afternoon and start the penalty trial the next day. That's at the very best. We have a suspicion, and we have good reason to believe that Mr. Ferguson is going to call people to introduce a statement that our client supposedly made to another inmate that he murdered other people which were very violent and well-known crimes throughout this entire area. If that comes in we are going to want to know it in advance so we can be prepared on our argument . . . If he's going to come in, which we think he is, and have an inmate in a penal institution say that our client murdered these Sorrell people over here, the woman and the child, which we believe he is, we would like to know in advance to number one, for argument purposes, and secondly for rebuttal purposes. It's absolute dynamite.

Mr. Ferguson: I just told you, we intend to introduce evidence, we will show that the defendant killed, was involved in the Sorrell murders and he was also involved in other criminal activity or crimes, including at least one other murder for which he has not been convicted or charged. And I'm stating that for the record . . . The evidence is going to be that he made those statements. But, I mean, you know, I'm giving you the evidence.

The Court: Who is the other murder that we're taking about?

Mr. Ferguson: A murder in California.

The Court: Any name?

Mr. Ferguson: Don't have a name, but a statement that the defendant made that he had committed that murder . . . The evidence is that we are going to introduce evidence to show that your client has been involved in other murders, including the Sorrell murders and including a murder in California as well as potentially other crimes.

Mr. Moore: **Is it going to be evidence or just his statement?**

Mr. Ferguson: **Statements that your client made.**

Mr. Moore: Nothing other than statements?

Mr. Ferguson: **To other people, that's correct. Statements made by your client that he did these things.**

Id. at 279-82.

Mr. Ferguson did not disclose to whom Coleman Gray allegedly had made statements or the context of the statements.

The Sorrell murders were one of the most highly publicized crimes in the history of the Tidewater, Virginia area. *Tr. of 4/21/94* at 46, 92, 96. In December, 1984 Lisa Sorrell and three-year old Shanta Sorrell were abducted from Greenbrier Mall in Chesapeake, Virginia. Five days later, Lisa Sorrell was found slumped in the passenger seat of her partially burned automobile. *Id.* at 97. She had been shot in the head six times by a .32 caliber firearm. Shanta, who apparently died of carbon monoxide inhalation, was found in the trunk of her mother's car.

On December 5, 1985 after all of the evidence concerning the McClelland murder had been presented, and the instructions had been given, the jury retired. That same day, the jury found Coleman Gray guilty on all counts. Defendant Gray's punishment on the robbery charge and the abduction charge were each set at life imprisonment. Gray's punishment on the arson charge was ten (10) years, and he was given four (4) years on each of the firearm charges.

On December 6, the separate penalty trial mandated in capital murder cases began. *See* Va. Code Ann. § 19.2-264.4 (Michie 1990 & Supp. 1994). The attorneys met in Judge Godwin's chambers that morning. Mr. Moore informed the court that the previous evening, Philip Ferguson had disclosed for the first time that he intended to introduce evidence about the Sorrell murders, other than statements allegedly made by Gray to fellow inmates. *Jt. App. Vol. 11* at 996-1001; *Tr. of 4/21/94* at 83. Despite the Commonwealth Attorney's previous unequivocal pledge that the only evidence to be introduced was certain *statements* made by Gray, Ferguson had arranged to present the following additional evidence at the penalty phase: 1) the testimony of the police officer who investigated the Sorrell murders; 2) all of the evidence collected at the Sorrell murder scene, including graphic photographs of the murder victims;[4] and 3) the medical examiner who investigated the cause of death and the nature and extent of the Sorrell's injuries.

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[4] Officer Slezak testified that he knew for an appreciable length of time, perhaps a month or more, that he would be called to testify in the Gray murder trial. *Tr. of 4/21/94* at 120.

Gray's attorneys informed the Court they were not prepared to defend their client for the Sorrell murders, aside from their ability to rebut certain statements allegedly made by Gray to fellow inmates. *Tr. of 4/21/94* at 44-45. Despite their plea for additional time to prepare, the circuit court permitted the Commonwealth's Attorney to introduce extensive evidence about the Sorrell murders. *Jt. App. Vol. II* at 996-1001, 1051-56.

The Commonwealth called Melvin Tucker to testify. Tucker was Gray's accomplice, and a man who had escaped prosecution for capital murder in exchange for his testimony. In May, 1985 while Tucker and Gray were looking for newspaper articles which discussed the McClelland murder, Gray allegedly pointed to an article with a picture of the Sorrells. The Petitioner then admitted that he had "knocked off" Lisa Sorrell. *Id.* at 774-75. The Sorrell murders had occurred on December 4, 1984, nearly six months earlier. No such newspaper article ever has been introduced into evidence.

Based solely upon the testimony of Gray's co-defendant, the Court allowed prosecutor Ferguson to introduce all of the forensic evidence gathered by the Chesapeake police department regarding the Sorrell murders. The Commonwealth called Detective Michael Slezak, the Chesapeake police officer who investigated the Sorrell murders, to testify. Officer Slezak presented evidence that the murders had actually occurred, by identifying various graphic photographs of the automobile and the victims. These photographs were admitted into evidence. *Id.* at 1056-78; *See* Pet. Ex. 10 (Tr. Ex. 45-56).

Officer Slezak failed to tell the jury that Timothy Sorrell, the victim's husband, was the primary and only suspect in the case for a substantial period of time. *Tr. of 4/21/94* at 45. At the evidentiary hearing conducted by the Court, however, Slezak acknowledged that Timothy Sorrell admitted being at the Greenbrier Mall on the evening of the murders, ignored the Nixons when they saw him at the Greenbrier Mall, made suspicious comments after he was notified his wife and child had been found, changed his alibi throughout the murder investigation, and had a motive to commit the murders. *Id.* at 101-03, 116. The police also designated Timothy Sorrel as their sole suspect on the evidence they sent to labs to be analyzed. *See* Pet. Ex. 3A-G (Certificates of analysis).

Timothy Sorrell visited a friend on the night his wife and children disappeared. That evening, five days before Lisa and Shanta were found, Sorrell allegedly told his friends that his wife and baby were dead. *Id.* at 112, 114-15.

Slezak's investigation also revealed that Timothy Sorrell had a motive to commit these murders. Two weeks prior to the brutal slayings, a life insurance policy had been issued for the Sorrells. *Id.* at 302, 309. Timothy and Shanta were Lisa's named beneficiaries. Six days before the trial of Coleman Gray began, Lisa Sorrell's parents, the Nixons, filed a lawsuit in the United States District Court for the Eastern District of Virginia, Norfolk Division, to prohibit Timothy Sorrell from getting the proceeds of that life insurance policy. *See* Pet. Ex. 1-2; *Tr. of 4/21/94* at 315-16, 421.

Alfred Brown, a private investigator hired by Gray, testified at the evidentiary hearing. The Nixons told Mr. Brown that one week prior to Lisa's death, a man possessing stolen merchandise came to the Sorrell's home. *Tr. of 4/21/94* at 281. The Nixons and officer Slezak suspected that Lisa was very angry and unhappy about her husband's apparent criminal activities. *Id.* at 422. Based upon all of this information, officer Slezak consulted the Chesapeake Commonwealth's Attorney, Robert Kowalski, and asked him to determine whether it was appropriate to prosecute Timothy Sorrell. *Id.* at 117-18.

Commonwealth's Attorney Ferguson never disclosed any of the above described information, which suggested that Mr. Gray was not involved in the Sorrell murders, to Gray's counsel. *Tr. of 4/21/94* at 53. In fact, Mr. Ferguson testified at the evidentiary hearing held before the Court that to his knowledge, "there [i]s no evidence that anybody else did commit this crime except Coleman Gray." *Id.* at 218, 238. Such an assertion is patently absurd.[5]

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[5] On the date of the Sorrell murders, Melinda Gray, the Petitioner's wife, had a dinner break from Murphy's Mart from 4:29 to 5:30. In order to determine whether Coleman Gray could pick up his wife, drive to the Greenbrier Mall, commit the crime, and return to Murphy's Mart within an hour, Detective Slezak drove the shortest route between the Mall and Murphy's Mart. At 3:00 p.m., it took Slezak approximately twenty-three minutes to travel one way between the locations. Investigator Alfred Brown drove this same route between 4:00 p.m. and 6:00 p.m., the time the murders were committed, and it took him over forty-three minutes. Therefore, it appears that Coleman Gray could not have performed the Sorrell murders on his wife's dinner hour, as the prosecutor speculated. *Tr. of 4/21/94* at 409.

Finally, Dr. Presswalla, the state medical examiner who performed the victims, autopsies, testified as to the victims' cause of death. *Jt. App. Vol. II* at 1069-77. The doctor's statements demonstrated that the Sorrell murders were accomplished in a manner strikingly similar to the style of the McClelland murder.

Gray's attorneys were not able to effectively cross-examine any of the witnesses who testified concerning the Sorrell murders. *Tr. of 4/21/94* at 66-67, 86-87; *Jt. App. Vol. II* at 1066-69, 1077. The only Sorrell murder evidence which they were prepared to challenge was the evidence Philip Ferguson indicated he would introduce at the outset of the trial: Melvin Tucker's statement that Gray allegedly had confessed to the murders.

Petitioner Gray took the stand and admitted that he had played a part in the McClelland murder. Nevertheless, the Petitioner denied being the triggerman, and blamed the killing on his accomplice. *Jt. App. Vol. III* at 1137-38. Gray flatly denied any involvement in the Sorrell

murders.[6] *Id.* at 1138. Gray also called seven witnesses who presented mitigating testimony on his behalf.

After the admission of all of the penalty phase evidence, the jury again retired to deliberate. The jurors unanimously fixed Gray's punishment at death. Following the sentencing hearing, on January 27, 1986 Judge Godwin sentenced Mr. Gray to death. Coleman Gray's execution was set for April 28, 1986.

To date, no one ever has been charged with or tried for the Sorrell murders. *Tr. of 4/21/94* at 200.

II.

The Supreme Court has recognized many times that the death penalty is a qualitatively different form of punishment than any other that can be imposed. *Gregg v. Georgia*, 428 U.S. 153, 185, 96 S. Ct. 2909, 2931 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978 (1976); *Hutchins v. Garrison*, 724 F.2d 1425, 1429 (*4th Cir.* 1983). The state's act of taking the life of a citizen differs

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[6] In July of 1985, officer Slezak interviewed Coleman Gray. Slezak lied to the Petitioner, and told him that Timothy Sorrell was about going to be tried for the Sorrell murders. The officer asked for Gray's assistance because he claimed there was evidence which would implicate Gray in the murder, and he needed Gray to provide an explanation.

Gray denied any involvement and, without being under any compulsion to cooperate, agreed to provide fingerprint samples.

Slezak then lied again to Mr. Gray, and told him that one of his fingerprints matched a sample taken from the Sorrell murder scene. Mr. Gray's insistence that he did not commit the crime did not waiver.

dramatically from any other legitimate state conduct. Precisely because of the terminal nature of this penalty, this Court and every other federal and state court must be exceedingly careful to insure that prior to imposing a sentence of death, every individual receives the full force of the protections and safeguards guaranteed by the United States Constitution. *Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597 (1991); *Burger v. Kemp*, 483 U.S. 776, 107 S. Ct. 3114 (1987); *California v. Brown*, 475 U.S. 1301, 1304, 106 S. Ct. 1367, 1368 (1986); *Gholson v. Estelle*, 675 F.2d 734, 738 (5th Cir. 1982) (holding that if a person is to be executed, it should be as a result of a decision based upon reason and reliable evidence).

Petitioner Gray argues that he was denied due process of law under the Fourteenth Amendment of the United States Constitution because the Commonwealth failed to provide fair notice that evidence concerning the Sorrell murders would be introduced at his penalty phase. Prosecutor Ferguson's decision to withhold this information and to surprise Mr. Gray's attorneys prevented the defense from effectively cross-examining the Sorrell murder evidence. This also led to the jury's finding, premised at least in part upon unreliable evidence, that the Petitioner posed a future danger to society and therefore deserved the death penalty.

The Court is compelled to agree with petitioner Gray. It is established beyond question that the penalty phase of capital trial must comport with Due Process Clause of Fourteenth Amendment. *See Gardner v. Florida*, 430 U.S. 349, 357-58, 97 S. Ct. 1197, 1204-05 (1977); *Witherspoon v. Illinois*, 391 U.S. 510, 521-23, 88 S. Ct. 1770 (1968); *United*

States v. Lundien, 769 F.2d 981, 986 (4th Cir. 1985). Therefore, the defendant has a legitimate interest in the character of his sentencing proceeding, even if he has no right to object to the result of the hearing. *Presnell v. Georgia*, 439 U.S. 14, 16, 99 S. Ct. 235, 236 (1978); *Gardner*, 430 U.S. at 359.

Specifically, the Due Process Clause does not allow the execution of a person "on the basis of information which he ha[s] no opportunity to deny or explain." *Simmons v. South Carolina*, 114 S. Ct. 2187, 2192 (1994) (*citing Gardner v. Florida*, 430 U.S. 349, 362, 97 S. Ct. 1197, 1207); *In re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499, 507 (1948); *Balwin v. Hale*, 68 U.S. 223, 233, 17 L.Ed. 531 (1863). Therefore, although in an ordinary case a defendant could be sentenced based upon information which was not disclosed to the defendant or his attorneys, *Williams v. New York*, 337 U.S. 241, 69 S. Ct. 1079 (1949), the Supreme Court has recognized that such a procedure is not acceptable in death penalty cases. *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197 (1977); *Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979).

The constitutional defect in Gray's penalty phase hearing that the Petitioner was confronted and surprised by the testimony of officer Slezak and Dr. Presswalla – violated Gray's right to fair notice and rendered the hearing clearly unreliable. The essence of the Due Process Clause is that a person has a right to be informed of the charges he is facing. When a defendant is deprived of fair notice, the entire judicial process becomes a hollow and meaningless procedure. *See, e.g., Lankford v. Idaho*, 500 U.S. 110, 111 S. Ct. 1723 (1991) (holding petitioner's lack of adequate notice created an impermissible risk that the adversary process may have malfunctioned).

As the Fifth Circuit Court of Appeals explained in *Smith v. Estelle*, "Surprise can be as effective as secrecy in preventing effective cross-examination, in denying the 'opportunity for [defense] counsel to challenge the accuracy or materiality of' evidence, and in foreclosing that 'debate between adversaries [which] often is essential to the truth-seeking function of trials.' " 602 F.2d at 699 (citations omitted). Gray's attorneys clearly and justifiably were shocked by the Commonwealth's introduction of officer Slezak's testimony, the chief investigator of the Sorrell murders, the statements of Dr. Presswalla, and the graphic evidence which accompanied these witnesses' testimony. Mr. Moore and Mr. Eason had less than one day's notice that the Commonwealth's Attorney planned to violate his direct promise to only introduce certain "statements" allegedly made by Coleman Gray to other inmates.

The consequences of this surprise could not have been more devastating. The prosecutor's tactics prevented Gray's attorneys from preparing questions for these witnesses prior to the sentencing, and from uncovering bias or from investigating the validity of the witnesses' planned testimony in order to gather information which could be used to impeach. *See, e.g., Profitt v. Wainwright*, 685 F.2d 1227, 1254 (11th Cir. 1982), *modified*, 706 F.2d 311 (11th Cir. 1983). The Petitioner's lawyers were unable to observe and study the documents, photographs, and other forensic evidence which was submitted by the Commonwealth, in order that objections could be made, or information helpful to the defense could be drawn from these materials. Mr. Moore and Mr. Eason also could not review the evidence collected by Chesapeake's police department which strongly suggested that

Timothy Sorrell actually committed the notorious murders. Finally, the defense attorneys could not adequately object to evidence presented, could not research the applicable law, and these attorneys had no opportunity to develop factual relevance objections and/or constitutional objections to the testimony introduced by the Commonwealth.

Thus, in this case, the Commonwealth's Attorney offered testimony and physical evidence about two completely distinct murders which could not be effectively cross-examined by the defense. Coleman Gray and his attorneys were ambushed. The evidence admitted during the penalty phase carries no assurance of reliability whatsoever, and the Court finds there was a gross abuse of sentencing process. For this reason, the death sentence imposed upon Gray cannot stand.

In addition to violating Gray's right to fair notice, the introduction of the Sorrell evidence also transgressed the Petitioner's right to be sentenced based upon constitutionally reliable evidence. *United States v. Tucker*, 404 U.S. 443, 447, 92 S. Ct. 589 (1972); *Townsend v. Burke*, 334 U.S. 736, 741, 68 S. Ct. 1252, 1255 (1948); *Richardson v. Johnson*, 864 F.2d 1536 (11th Cir. 1989). As the *Gholson* court noted, the denial of the opportunity for explanation or argument by defense counsel and for defense counsel to challenge the accuracy or materiality of the information necessarily reduces the reliability of the evidenced [sic] presented. 674 F.2d at 738 (*citing Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197 (1977)).

The Sorrell murder evidence which linked Coleman Gray to the crime was very questionable. The murders were the most highly publicized crimes in history of this

local, and the primary connection between Coleman Gray and the Sorrell slayings was the testimony of Melvin Tucker, Gray's co-defendant. Recognizing the well established maxim that accomplice testimony is sufficient to support a conviction, the Court nevertheless views such information with caution. *United States v. Manbeck*, 744 F.2d 360, 392 (4th Cir. 1984); *Watkins v. Commonwealth*, 238 Va. 341, 385 S.E.2d 50 (1989). Aside from Tucker's statement, most of the evidence equally supports the Commonwealth's original theory: Timothy Sorrell committed the Sorrell murders. Because neither the defense attorneys, the court, nor the jury ever had the opportunity to explore the veracity and credibility of the Commonwealth's witnesses and physical evidence, the unchallenged evidence is not sufficiently reliable or corroborated to support the jury's finding of future dangerousness.

Although the Supreme Court has held that abridgement of fundamental constitutional rights at sentencing may be justified in some instances where the state demonstrates a compelling interest, the Commonwealth has not offered any justification for its unreliable procedure in this case. *See Gardner*, 430 U.S. at 358-61, 97 S. Ct. at 1205-06. Instead, the Commonwealth has insisted that it had no duty to give any notice to Coleman Gray that evidence he committed the Sorrell murders was to be introduced. For the reasons stated above, the Court disagrees, and finds that Commonwealth's Attorney Ferguson's tactics violated the moral standards of fair play embodied in the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The presence of these constitutional violations leads to the undeniable conclusion that Coleman Gray's sentencing hearing was fundamentally and irreparably

unfair. Because the jury was presented with and considered the unreliable Sorrell murder evidence, Gray's death sentence is constitutionally defective and cannot be upheld. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464 (1986).

III.

For the reasons set forth above, the Court finds that petitioner Coleman Wayne Gray was deprived of his right to due process guaranteed by the Fourteenth Amendment of the United States Constitution. The Commonwealth failed to give fair notice of its intention to prove, at the penalty phase of the McClelland trial, that Gray committed two distinct murders with which he had not been arrested for, charged or convicted. Absent the surprise introduction of the Sorrell murder evidence, there is a substantial probability that the result of Gray's sentencing would have been different. Accordingly, the Court will GRANT Coleman Gray a writ of habeas corpus, VACATE the Petitioner's death sentence, and REMAND the cause to the Circuit Court of the City of Suffolk in order that the Petitioner can be resentenced.

An appropriate Final Order shall issue.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES
DISTRICT JUDGE

Date: AUG 25 1994

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COLEMAN WAYNE GRAY, *Petitioner-Appellee,* v. CHARLES E. THOMPSON, Warden, Mecklenburg Correctional Center, *Respondent-Appellant.*	No. 94-4009
COLEMAN WAYNE GRAY, *Petitioner-Appellant,* v. CHARLES E. THOMPSON, Warden, Mecklenburg Correctional Center, *Respondent-Appellee.*	No. 94-4011

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge.
(CA-91-693-R)

Argued: May 3, 1995

Decided: June 28, 1995

Before HALL, WILKINSON, and WILKINS,
Circuit Judges.

Reversed and remanded with instructions to dismiss by published opinion. Judge Wilkinson wrote the opinion, in which Judge Wilkins joined. Judge Hall wrote a concurring opinion.

OPINION

WILKINSON, Circuit Judge:

Coleman Wayne Gray was convicted of capital murder in a Virginia court. Gray exhausted his state remedies and then petitioned for a writ of habeas corpus, alleging, *inter alia*, that his sentencing violated the Due Process Clause. On that ground the district court issued the writ, and the Commonwealth of Virginia now appeals. We reverse and remand with instructions to dismiss the petition.

I.

On the evening of May 2, 1985, Gray and his friend Melvin Tucker drove into the parking lot of a Murphy's Mart department store in Portsmouth, Virginia. They observed the store manager, Richard McClelland, inside. McClelland had recently discharged Gray's wife from her job at the store, thereby displeasing Gray, who told a friend he was "going to get" McClelland. When McClelland left work in his automobile, Gray and Tucker followed. *See Gray v. Commonwealth*, 356 S.E.2d 157, 172 (Va. 1987).

At an intersection, Gray pulled his car in front of McClelland's and blocked the road. Armed with a .32 caliber revolver, Gray ordered McClelland into Gray's car. Gray and his two passengers then returned to Murphy's Mart. While Tucker waited in the car, Gray forced McClelland inside the store at gunpoint. McClelland was told that if he refused to cooperate, his family would suffer. Gray and McClelland then emerged from the store with three sacks of cash containing approximately $12,000. They joined Tucker in the car and departed. *Id.*

Gray drove to a service station and fueled the automobile. He removed a gas can from the trunk and filled it with gasoline as well. Gray then proceeded to a remote dirt road, stopped the car, and commanded McClelland to get out. Gray ordered McClelland to lie face down on the ground. As McClelland did so, he begged Gray not to hurt him. Gray assured McClelland he had nothing to fear, and then fired six bullets into the back of McClelland's head with the .32 caliber handgun. The shooting was execution style: the shots were fired in rapid succession, from a range of three to eighteen inches. Gray told Tucker as they drove away from the murder scene that he had to shoot McClelland because McClelland knew him. *Id.* at 172-73.

The two men then returned to the intersection where they first abducted McClelland. Gray informed Tucker that he intended to burn McClelland's car to destroy the evidence. Gray soaked the interior of McClelland's car with gasoline from the gas can, tossed a lit match into the car, and fled. Gray and Tucker returned to Gray's apartment to count the money. *Id.* at 173.

Both Gray and Tucker were subsequently indicted on various criminal counts. Tucker pleaded guilty to lesser charges in exchange for agreeing to testify against Gray. Gray, however, went to trial for armed robbery, abduction, arson, unlawful firearm use, and capital murder. In a pre-trial motion, Gray's counsel asked the court to appoint a private investigator to assist the defense, but the motion was denied. Gray's counsel also moved for discovery under Rule 3A:11 of the Virginia Supreme Court. The court issued a discovery order pursuant to that Rule and included an additional provision requiring the disclosure of exculpatory evidence.

On Monday, December 2, 1985, the guilt phase of Gray's trial began. Following a motion by the defense under *Peterson v. Commonwealth*, 302 S.E.2d 520 (Va.), *cert. denied*, 464 U.S. 865 (1983), the Commonwealth's Attorney informed the defense of evidence he planned to introduce at the penalty phase to show Gray's future dangerousness. Specifically, he stated that prosecution witnesses would testify that Gray told them he killed a mother and daughter named Lisa and Shanta Sorrell. At the guilt phase, the key issue was whether Gray was the actual triggerman in the McClelland murder. Gray chose not to take the stand but his counsel argued that it was Tucker, not Gray, who shot McClelland, while Tucker asserted just the opposite. Two witnesses for the prosecution, who had been imprisoned with Gray, testified that Gray told them he killed McClelland.

On Thursday, December 5, 1985, the jury convicted Gray on all counts. That evening, the Commonwealth's Attorney informed the defense that at the penalty phase, scheduled to begin the next morning, he intended to offer

evidence of the Sorrell murders in addition to the incriminating statements that he discussed with the defense on Monday. The proposed evidence consisted of testimony by the police detective who investigated the murders, testimony by the state medical examiner who performed the victims' autopsies, and photographs and forensic evidence of the crime scene. Defense counsel interviewed the police detective over the telephone that night.

The following morning, Friday, December 6, the penalty phase began. During an in-chambers conference, Gray's counsel asked the court to exclude the additional Sorrell evidence on the ground that it exceeded the scope of corroborating evidence permissible under state law, and that they were unprepared to rebut it that day. The court expressed the view that the evidence was admissible at sentencing.

At the penalty phase, the prosecution first offered evidence of other criminal acts committed by Gray. That evidence included his criminal record, which the Virginia Supreme Court noted reflected thirteen felony convictions, at least nine of which were for violent crimes. *See Gray*, 356 S.E.2d at 179.

Tucker then took the stand on behalf of the Commonwealth and addressed the Sorrell murders. He testified that shortly after the McClelland murder, he and Gray were scanning the local paper for news of the McClelland investigation. According to Tucker, Gray pointed to a picture of Lisa Sorrell in the paper and declared that he had killed her. At the close of Tucker's direct examination, the defense stated that it had no questions of him. The defense at that time formally moved to exclude the

additional Sorrell evidence, but the motion was denied. The court noted that defense counsel had been informed of the evidence the day before.

The Commonwealth next called Detective Michael Slezak. Slezak testified that he discovered the body of Lisa Sorrell in the driver's seat of a burned-out automobile and found the body of three-year-old Shanta in the trunk. He also testified that an expended match was recovered from the interior of the car: the automobile, like McClelland's, was apparently ignited after the murder. Slezak identified several photographs of the crime scene, which were each admitted into evidence. He offered no opinion on who was responsible for the murders, however. The defense then cross-examined Slezak. The questions emphasized the highly-publicized nature of the Sorrell murders and suggested that due to the possibility of a "copycat crime," the Sorrell and McClelland murders might not have been committed by the same person.

Finally, the Commonwealth called the medical examiner, Dr. Faruk Presswalla. His statements indicated that the Sorrell murders were performed in a manner strikingly similar to that of the McClelland murder. He testified that Lisa Sorrell was killed by six .32 caliber gunshots to the back of her head, and that Shanta died from smoke inhalation. He identified autopsy photographs, which were admitted into evidence. The prosecution also introduced Dr. Presswalla's autopsy report. The defense stipulated to Dr. Presswalla's expert status and declined to cross-examine him.

The defense, in turn, called seven witnesses to present mitigating evidence. They testified largely to their favorable opinions of Gray's character. *Gray*, 356 S.E.2d at 177. Then, Gray himself took the stand. He denied any involvement whatsoever in the Sorrell murders. When asked whether he had anything he wished to say to the jury, he stated that his participation in the McClelland murder was limited to driving the car, and he swore that it was not he who pulled the trigger and killed McClelland.

The court instructed the jury on the aggravating factors under the Virginia death penalty statute – the vileness of the crime charged and the future dangerousness of the defendant. Upon deliberation, the jury unanimously found the existence of both aggravators and fixed Gray's sentence at death.

The Virginia Supreme Court affirmed Gray's conviction and sentence, *Gray*, 356 S.E.2d 157, and the U.S. Supreme Court denied certiorari. 484 U.S. 873 (1987). Gray then instituted state habeas proceedings. The state habeas court dismissed the petition, the Virginia Supreme Court summarily affirmed the dismissal, and the U.S. Supreme Court again denied certiorari. *Gray v. Thompson*, 500 U.S. 949 (1991).

Thereafter, Gray filed the instant petition for a writ of habeas corpus. He alleged numerous constitutional violations with respect to both phases of the trial. The district court held an evidentiary hearing and heard testimony from trial counsel and the prosecution witnesses as to the events at sentencing. Of particular interest to the district

court was Detective Slezak's testimony that Timothy Sorrell, Lisa's husband, had been an initial suspect in the Sorrell murders, although upon further investigation he was not charged. The district court granted the writ and vacated Gray's sentence, finding that the prosecution had "violated the moral standards of fair play embodied in the Due Process Clause" by unfairly surprising the defense with the additional Sorrell evidence. The decision was stayed pending this appeal.

II.

The primary challenges to Gray's sentence involve the aggravating factors found by the jury. Petitioner asserts that the vileness element as applied to him was unconstitutionally vague under *Godfrey v. Georgia*, 446 U.S. 420 (1980). He also contends that use of the supplemental Sorrell evidence as proof of future dangerousness was unconstitutional under *Gardner v. Florida*, 430 U.S. 349 (1977). We hold that the district court properly rejected the former claim, but that it erred in issuing the writ based on the latter.

A.

We first address the vileness factor. Virginia law provides that a jury may impose the death sentence if it finds that the conduct "for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Va. Code § 19.2-264.2(1). To pass muster under *Godfrey*, a sentencing factor must be sufficiently limited to "channel the sentencer's discretion by

'clear and objective standards' that provide 'specific and detailed guidance.' " 446 U.S. at 428. Even before *Godfrey* was decided, however, the Virginia Supreme Court provided a narrowing construction of the vileness provision. *See Smith v. Commonwealth*, 248 S.E.2d 135, 149 (1978) (defining depravity of mind as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation" and aggravated battery as "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder"), *cert. denied*, 441 U.S. 967 (1979). Here, the court gave the *Smith* definitions to the jury essentially *verbatim*, and the jury found unanimously that Gray's murder of McClelland satisfied the vileness predicate.

We have repeatedly held that limiting instructions based on *Smith* meet the constitutional standard set forth in *Godfrey*. *See Turner v. Williams*, 35 F.3d 872, 891-92 (4th Cir. 1994); *Jones v. Murray*, 976 F.2d 169, 174-75 (4th Cir.), *cert. denied*, 113 S.Ct. 27 (1992); *Jones v. Murray*, 947 F.2d 1106, 1117 (4th Cir. 1991), *cert. denied*, 503 U.S. 973 (1992); *Boggs v. Bair*, 892 F.2d 1193, 1197 (4th Cir. 1989), *cert. denied*, 495 U.S. 940 (1990); *Turner v. Bass*, 753 F.2d 342, 350-53 (4th Cir. 1985), *reversed in part on other grounds*, 476 U.S. 28 (1986). It is manifest that *Godfrey* does not demand more. *See Turner v. Bass*, 753 F.2d at 353 ("*Godfrey* [does not] require[ ] that a jury be instructed on each term in the aggravating circumstances.").

B.

We next turn to the question of future dangerousness.[1] Virginia also permits the death penalty if the jury "find[s] that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society." Va. Code § 19.2-264.2(1). In considering the defendant's potential violence, the Virginia jury has never been restricted to proof of adjudicated criminal convictions. To the contrary, the Commonwealth may introduce evidence of criminal misconduct for which the defendant has been neither tried nor convicted. *Watkins v. Commonwealth*, 331 S.E.2d 422, 435 (Va. 1985), *cert. denied*, 475 U.S. 1099 (1986). This rule of latitude – which also allows the defendant to present a wide range of mitigating evidence – was fashioned pursuant to the Supreme Court's instruction that "it [is] desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 204 (1976); *see Gray*, 356 S.E.2d at 175 (relying on *Gregg*); *Watkins*, 331 S.E.2d at 435-36 (relying on *Jurek v. Texas*, 428 U.S. 262, 275-76 (1976)).

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[1] Petitioner and the Commonwealth disagree about the effect of a holding that the future dangerousness finding was invalidated by the additional Sorrell evidence. Petitioner contends that it would vitiate the entire sentence, whereas the Commonwealth argues that the sentence could be supported by the independent jury finding of vileness. *See Zant v. Stephens*, 462 U.S. 862, 887 n.24 (1983); *Briley v. Bass*, 750 F.2d 1238, 1245 n.12 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985). In view of our disposition of the future dangerousness claim, *infra*, we need not reach this question.

In the instant case, petitioner claims that the future dangerousness verdict is invalid because he was unfairly surprised by the additional Sorrell murder evidence, and that effective rebuttal of the prosecution's evidence was thereby precluded. Petitioner and his counsel knew at the outset of the guilt phase that he would be accused of the Sorrell murders in penalty proceedings, however, and were informed of the additional evidence the night before that phase began. Thus, the precise rule petitioner seeks is a constitutional entitlement to *adequate advance* notice of *particular* items of evidence.

In *Caspari v. Bohlen* the Supreme Court made clear that federal courts *must* analyze whether a habeas petitioner seeks to extend the boundaries of existing law before considering the merits of the claim, if the state so argues. 114 S. Ct. 948, 953 (1994). The district court, however, never acknowledged this mandatory framework in its final opinion. We now address the question, and we find that petitioner's rule would be novel even today and certainly was not compelled by existing precedent at the time his conviction became final. *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Because federal courts generally may not create or apply new constitutional rights on collateral review, *id.* at 487, petitioner's claim must fail.

Petitioner relies largely on *Gardner v. Florida*, *supra*, for the proposition that use of the Sorrell evidence violated the Due Process Clause. That case, however, does not dictate the conclusion that petitioner had a constitutional right to some minimum amount of advance notice of the particulars of the prosecution's penalty case. In *Gardner*, the judge relied on confidential portions of a presentence report in deciding to sentence the defendant

to death, but never disclosed that information to the defense until judgment was entered. 430 U.S. at 353. Because the defendant was sentenced "on the basis of information that he had no opportunity to deny or explain," the sentencing proceeding was unconstitutional. *Id.* at 362.

Petitioner, by contrast, was not sentenced on the basis of any secret information. Rather, the evidence of petitioner's future dangerousness was advanced in open court, and petitioner's counsel was specifically afforded the chance to cross-examine the adverse witnesses. *See Williams v. New York*, 337 U.S. 241 (1949) (no due process violation where judge discussed sentencing evidence in open court, even though some of the evidence was not previously disclosed to the defense). Indeed, defense counsel cross-examined Detective Slezak, who had been interviewed the preceding evening, and chose not to cross-examine Dr. Presswalla after stipulating to his competence. If the defense felt unprepared to undertake effective cross-examination, one would think a formal motion for continuance would have been forthcoming, but none was ever made; counsel moved only that the evidence be excluded. And, after the supplemental Sorrell evidence was presented, petitioner took the stand and directly addressed the jury. Plainly, petitioner *had* an opportunity to explain or deny the evidence. This case is thus distinguishable from *Gardner* on first principles. *See Proffitt v. Wainwright*, 685 F.2d 1227, 1254 (11th Cir. 1982) (explaining that *Gardner* "simply prohibits the use of 'secret information'; the Court did not in that case address the scope of the capital defendant's procedural rights in attempting to rebut information that has openly been presented to

the sentencing tribunal."), *cert. denied*, 464 U.S. 1002 (1983).[2]

Gardner itself warned against broad expansions of its holding. Although *Gardner* extended the guarantee of due process to the sentencing context, the extension was carefully circumscribed. The fact that due process applied at sentencing did not transport into that phase of capital proceedings "the entire panoply of criminal trial procedural rights." 430 U.S. at 358 n.9. Notably, there is no right to advance notice of witness statements, much less to evidence that merely corroborates such statements, in federal trials. Witness statements are not discoverable until after the witness has testified on direct examination. *See* 18 U.S.C. § 3500(a). This practice has, to our knowledge, never been found to offend the Due Process Clause. In light of the fact that *Gardner* expressly avoided importing even established trial rights into sentencing, it is implausible that it created sentencing rights that are nonexistent at trial. In sum, *Gardner* did not clearly forbid the jury from sentencing petitioner on the basis of the Sorrell evidence.

The district court's justification for relying on *Gardner* is in error. In applying *Gardner* to the facts of this case, the district court cited a passage from *Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979), *aff'd on other grounds*, 451 U.S. 454 (1981), in which the Fifth Circuit reasoned

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[2] It follows that this is not a case in which we are asked merely to "apply an extant normative rule to a new set of facts," *Turner v. Williams*, 35 F.3d 872, 885 (4th Cir. 1994), as the rule in *Gardner* does not apply even generally to this case.

that "[s]urprise can be as effective as secrecy in preventing effective cross-examination" and thus denying defense counsel the opportunity to challenge prosecution evidence. *Id.* at 699. The *Estelle* decision was based on *Gardner*. *Estelle*, however, is a habeas case that was decided before the Supreme Court limited the formulation of new rules on collateral review. *See Teague v. Lane*, 489 U.S. 288 (1989). Extending the holding of *Gardner*, which involved a complete failure to disclose, to a case in which disclosure was made but allegedly so late as to be unfair, requires the analytical equation of "secrecy" and "surprise." While the *Estelle* court may have been free to make that leap in extending *Gardner*, such analysis is no longer permissible on collateral review. *See Caspari*, 114 S. Ct. at 957.

Not only is petitioner's position not mandated by *Gardner*, but other precedent existing at the time his conviction became final counsels affirmatively against it. In *Weatherford v. Bursey*, 429 U.S. 545 (1977), the Supreme Court held that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Id.* at 559. As *Weatherford* explains, *United States v. Brady*, 373 U.S. 83 (1963), created a constitutional right to exculpatory evidence, but not to all information that might be helpful in preparing for trial. 429 U.S. at 559; *see also United States v. Agurs*, 427 U.S. 97, 109-10 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense . . . does not establish 'materiality' in the constitutional sense."). Here, the prosecution had already responded to the *Brady* segment of the pre-trial discovery order when the defense requested the penalty evidence. Beyond that, *Weatherford* reiterates,

" 'the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded.' " 429 U.S. at 559 (quoting *Wardius v. Oregon*, 412 U.S. 470, 474 (1973)). The federal circuits have taken their cue from this precedent and have narrowly construed the requirements of due process in the context of discovery challenges. *See e.g., United States v. Polowichak*, 783 F.2d 410, 414 (4th Cir. 1986); *United States v. Kendall*, 766 F.2d 1426, 1440-41 (10th Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986); *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980). Thus, rather than deeming petitioner's claim to be iron-clad, a reasonable jurist might well have found that the Supreme Court and several circuits had affirmatively rejected arguments similar to petitioner's.

The practical import of the rule sought by petitioner underscores its novelty. If the Due Process Clause entitled defendants to some minimum advance notice of ancillary evidence, federal courts would be thrust deep into state criminal proceedings. The general scope of discovery at such trials, however, represents precisely the type of question that has traditionally been left to the states. *See Herrera v. Collins*, 113 S. Ct. 853, 864 (1993). Here, for instance, the prosecution notified the defense of its penalty evidence, including Gray's incriminating statements, not pursuant to any perceived mandate of due process but according to Virginia's "preferred practice." *Peterson v. Commonwealth*, 302 S.E.2d at 526 (prosecution may proffer evidence of unadjudicated criminal conduct to show future dangerousness, but "[i]n fairness to the defendant- . . . the preferred practice is to make known to him before trial the evidence that is to be adduced at the penalty stage if he is found guilty"). State practices of criminal